(22,668.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 596.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, APPELLANT,

vs.

JAMES F. BENEDICT, TREASURER OF THE CITY AND COUNTY OF DENVER, AND THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, on the twenty-third day of September, A. D. 1909, a transcript of record from the Circuit Court of the United States for the District of Colorado for use in connection with a petition for supersedeas and restraining order was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein The Singer Sewing Machine Company of New Jersey was Appellant and James F. Benedict, Treasurer of the City and County of Denver, et al., were Appellees; that on the thirtieth day of October, A. D. 1909, a complete transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Colorado was filed in the office of the Clerk of said Circuit Court of Appeals in said cause, whereupon certain proceedings were had resulting in a dismissal of said appeal and the appellant having perfected a second appeal from the decree of said Circuit Court filed and docketed in said Circuit Court of Appeals on the twenty-seventh day of January, A. D. 1910, as No. 3328, the record and all proceedings in case No. 3166 were transferred to case No. 3328, between the same parties, which said transcript of record together with the transcript upon the second appeal is in the words and figures following, to-wit:

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it Remembered heretofore, and on, to-wit, the twenty-fifth day of October A. D. 1906, came The Singer Sewing Machine Company by R. A. Gilmore, Esquire, its solicitor, and filed in said court its bill of complaint; and sued out of and under the seal of said court a subpoena in chancery against William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and The City and County of Denver.

And the said bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the District of Colorado.

The Singer Sewing Machine Company of New Jersey, a corporation, Plaintiff,

vs.

James F. Benedict, Treasurer of the City and County of Denver a municipal corporation and The Board of County Commissioners of the City and County of Denver, Defendants.

By leave of court July 27, 1909.

Bill of Complaint.

2 To the Honorable, the Judges of the Circuit Court of the United States for the district of Colorado:—

The Singer Sewing Machine Company of New Jersey, a corporation organized under and by virtue of the laws of the state of New Jersey, domiciled in and a citizen of the said state, brings this its bill of complaint against William J. Fine, treasurer of the City and County of Denver, a citizen of and domiciled in the state of Colorado, and the said City & County of Denver, a municipal corporation of Colorado, and thereupon the plaintiff complains and says:—

1. That the amount in controversy in this action exceeds the sum of $2000.00.

2. That the plaintiff is a corporation engaged in the business of purchasing and selling sewing machines; that the said machines are purchased of the manufacturer, the Singer Manufacturing Company, partly in the state of New Jersey and

partly in the state of Indiana; that none of the said machines are purchased in the state of Colorado; that the plaintiff has established an agency at the city of Denver in the state of Colorado, which has supervision over other sub-agencies in the district comprising the state of Montana, Idaho, Utah, Wyoming, Colorado, a part of the states of South Dakota, Nebraska and Texas and the territories of New Mexico and Arizona; that manufactured sewing machines are shipped in the original packages in car-load lots from the place of manufacture
3 in New Jersey and Indiana to sub-agencies in each of the said several states and territories, under the general supervision of the said agency in the city of Denver; that such machines are sold partly for cash and partly on credit; that when the same are sold on credit or partly on credit, notes and other obligations are received from the purchaser, which are delivered to the manager of the sub-agencies in the said several states, who makes weekly reports of such sales to the said agency at Denver, accompanying therewith all the money which he has received and the said notes and obligations, of which, when received at the said agency at Denver, an accounting is there had for the purpose of keeping a record of such sales, and the payments made thereon, and, thereupon, at periods not exceeding one week, an accounting is made of all said moneys, notes and obligations received and the same, together with all moneys, notes and obligations, are transmitted to the general home agency of the plaintiff company in the city of New York; that the said moneys, notes and obligations are never returned to the agency at Denver, except in individual instances where such notes or obligations are required to assist in making collections, but the same are kept and preserved at the said home agency in the city of New York; that the said notes and obligations are not made payable at the agency in Denver, but at the said several sub-agencies where the sales of the same were made, as hereinbefore stated; that the said
4 machines are sent for sale from the said places of manufacture and purchase in the states of New Jersey and Indiana with the expectation that they will end their transit, after purchase, in the several states to which they are transported for the purpose of sale, where the same are sold, and when so sold the said purchase money and the notes and other obligations given for the purchase thereof, are transmitted by the selling agency to the city of New York, the home agency, through the supervising and accounting agency at the city of Denver; that such transmission of machines for sale, and the remitting of the proceeds thereof to the home agency at the city of New York, is a constantly recurring course of commerce between the states of purchase and manufacture and

the states where the same are sold, and from which the proceeds are transmitted to the said home agency in the city of New York; that such transmission of money, notes and other obligations from the place of sale to the place where such money and deposits are permanently deposited in the city of New York, is interrupted only by temporary delay at the agency of said company in the city of Denver solely for the purpose of accounting and supervision; that none of the said moneys is ever "kept and used loaned and invested within this state for profit"; that the parties owing the moneys due on such credits reside in the several states of Montana, Idaho, Utah, Wyoming, Colorado, Texas, Nebraska and South Dakota, and in the territories of New Mexico and Arizona,
5 and the party owning and holding the credits is a corporation domiciled in the state of New Jersey.

3. That in accordance with the laws of the state of Colorado, the plaintiff did, on or about the 19th day of May, A. D. 1905, prepare and deliver to the assessor of the City and County of Denver, a paper which is designated as a "Tax Schedule"; that in such tax schedule the said company made return of property for taxation as follows: "Average value moneys and credits invested in mdse. or mfgrs. during each calendar month year ending March 31st last, $3500; value of furniture and fixtures, $300.00; total $3800.00 which covered all the property of the plaintiff within the City and County of Denver; that such tax schedule was duly sworn to in the manner and form as provided by law and placed in the hands of the assessor within the time as by law in such case made and provided; that under the law of Colorado it is made a duty of each owner of personal property to make a list of his taxable property within the said state upon tax schedules prepared by the proper officers for that purpose, and it is the duty of the owners of such property to place a valuation upon such personal property at the fair market value thereof, and the same is assessed for taxation on the basis of such valuation, unless the assessor increases the valuation and gives notice thereof to the owner of such property in manner and form as provided by law, as will
more fully hereinafter appear. That the said tax sched-
6 ules were prepared under the provisions of an Act of the General Assembly of the state of Colorado entitled, "An Act in relation to the public revenue, and repealing all other acts or parts of acts in conflict herewith", approved March 22nd, 1902, and will hereinafter be referred to as the "Revenue Act"; that section 93 of the said Revenue Act, so far as the same relates to any of the matters or things contained herein, is as follows:

If in the opinion of any taxpayer, his property has been twice assessed, or if the property exempt from taxation has been assessed, or if any personal property has been assessed of which said person was not possessed at the time of the assessment, or if any property has been assessed too high, or if any property has been otherwise illegally assessed, such person having such grievance may appear before the assessor and make known to the assessor the facts in the premises; and if in any particular the assessment complained of is erroneous under the Statutes, the assessor shall correct the same; The assessor shall, prior to the first Tuesday in August of each year, mail to each person, association or corporation whose property has been assessed at a valuation other than that given in the schedule filed by such person, association or corporation, a statement of any such change in valuation, and shall give notice, by publication in at least one issue of a paper published in the county seat, that on a day therein to be named he will sit to hear any and all objections to the assessment roll. ****

Section 94. In all cases where the amount of the total assessed valuation assessed against such taxpayer exceeds the sum of $7500. Every objection and statement of grievance pursuant to the foregoing section shall be in writing, stating the particular grounds of such objection, or the particular facts wherein such grievance consists; and if such objection be overruled by the assessor, in whole or in part, he shall state briefly in writing the grounds of his refusal, and the taxpayer complaining may appeal from his decision to the district or county court of the county wherein the property is assessed on or before the first Monday in January following said assessment. * * And in all cases where any tax so collected shall be refunded, the taxpayer shall be entitled to receive interest on the amount refunded at ten per cent. per annum from the time of payment thereof; provided, however, that the said court shall not review or give relief against an assessment unless it shall appear manifestly excessive, fraudulent or oppressive.

4. That thereafter, but at what date the plaintiff does not know, except that it was subsequent to the first day of October, 1905, the assessor assessed the plaintiff on property at a valuation other than given in the schedule by the plaintiff, as follows, to-wit:

Personal Property If no property is owned under any item the word "none" must be written opposite such item.	Valuation of Personal Property by Assessor.

Aggregate cash value of all prom. notes, bonds, debentures, and other written evidence of indebtedness belonging to or payable to you.....$	)	
Aggregate cash value of amount due upon book accounts and other accounts not evidenced by writing .....$	)	$60,000.00
Cash value of National Bank stock .....$	)	
Average cash value deposits in banking institutions in Colorado .....$	)	
Average cash value deposits in banking institutions outside of Colorado .....$	)	

thereby increasing the assessed valuation of the plaintiff's property in the sum of $60,000.00; that the tax schedule, as prepared by the plaintiff, did not contain any valuation set opposite the items mentioned in the 4th paragraph included
8 in the bracket, against which the assessor had placed the figures of $60,000.00, but against each one of said paragraphs the plaintiff had correctly and truthfully written the word none,, in accordance with instructions contained at the head of the column in which the said paragraphs occur, as follows: "If no property is owned under any item the word 'none' must be written opposite such item"; that the plaintiff is advised that the said assessor intended to assess and thereby tax the money, notes and other obligations aforesaid, passing through the plaintiff's general agency at Denver. That the plaintiff at that time, or at any time previous thereto, did not have in the state of Colorado any personal property comprehended within the words contained in the said schedule, viz: "Aggregate cash value of all prom. notes, bonds, debentures and other written evidence of indebtedness belonging to or payable to the plaintiff, or any personal property comprehended in the following, to-wit: "Aggregate cash value of amount due upon book accounts and other accounts not evidenced by writing", or comprehended under the following, to-wit: "Cash value of National Bank stock", or comprehended under the following, to wit: "Average cash value deposits in banking institutions in Colorado", or comprehended under the following, to-wit: "Average cash value deposits in banking institutions outside of Colorado", except that within the words contained in the paragraph last above mentioned the plaintiff, a foreign corporation, domiciled in the state of New Jersey, and having its home office and principal place of business
9 in the city of New York, had, in the said city of New York, on deposit in banking institutions, various quantities of money so deposited by the plaintiff in said city by the officers located in the said city of New York and not by any officers or agents of the company located or residing in the

state of Colorado. The plaintiff is advised that money owned and held by the plaintiff in the city of New York, having no connection whatever with its business in the state of Colorado, deposited by its own local officers in the city of New York in banking institutions there located, is not within the taxing jurisdiction of the state of Colorado and that the words in said schedule, to-wit: "Average cash value deposits in banking institutions outside of Colorado", do not refer to deposits of money made in banking institutions outside of Colorado when such deposits are made by the officers of the said company themselves outside of Colorado, but that on the contrary, the said clause was there inserted in order to ascertain the value of deposits in banking institutions outside of Colorado when so deposited by persons residing in Colorado.

5. And the plaintiff further states, that at some time, the exact date to the plaintiff unknown, but subsequent to the first day of October, 1905, the County Assessor placed in such schedule the valuation of "$2500" opposite to the following, to-wit: "Average cash value of all other property of any kind owned or held or controlled by me not hereinbefore specifically mentioned"; whereby the plaintiff's assessed valuation was increased an additional $2500, that the plaintiff had no such property at the date of the said schedule, or at any time previous thereto in the state of Colorado; that the plaintiff, at the time of making out the said schedule, listed all the personal property owned, possessed or held by it within the said City and County of Denver, and it had no other property of any kind owned, held, or controlled by it not included and enumerated in the amount of $3800, hereinbefore stated.

6. That the plaintiff has hereunto attached a copy of the said tax schedule of 1905 and made the same a part hereof, that the same may more fully appear as it was prepared by the plaintiff, and has thereon written, in black ink the words and figures as written by the plaintiff, and in red ink the words and figures as written by the assessor.

7. That the said assessor did not, as required by section 93 of the Revenue Act, prior to the first Tuesday in August, mail to the plaintiff a statement of any such change or increase of valuation, as hereinbefore stated, nor did he after the first day of August, or at any other time, give any notice whatever to the plaintiff that the valuation of its personal property had been raised or changed, or that the same had been assessed at a valuation other or different from that contained in the tax schedule of 1905, as prepared by the plaintiff.

11 8. That the first knowledge or information had by the plaintiff that its valuation of personal property for taxation purposes had been raised or changed from $3800.00 to $66,300.00 or was in any respect different from the amounts and values placed in the schedule by it on the said 19th day of May, 1905, was a notice received from the county treasurer dated January 15, 1906, by which the plaintiff was notified as follows: "You are hereby notified that the following taxes assessed in your name for the year 1905 are now due: Personal property valuation, $66,300; tax $2154.75". That at that time the tax warrant and the tax list for the year 1905 had been for several weeks in the possession of the County Treasurer, a ministerial officer whose duty it was to collect the taxes as contained in said list and directed by the said tax warrant; that the said County Treasurer is clothed with no discretion by the statutes of Colorado in reference to the collection or omission to collect any sums contained in said tax list; that it is his duty to collect the same without any reference whatever as to the legality of the assessments or valuations; that at the time the plaintiff received the said notice the said assessment and valuation placed upon the plaintiff's property had passed beyond control or discretion or authority of the ministerial or administrative officers of the said City and County to make any change or modification of the said tax list, or the valuation placed upon the property therein
12 contained, or the amount of the assessment of the tax levied thereon.

8. That at the time the plaintiff received the said notice from the said Treasurer the said taxes were due, under the laws of the state of Colorado, and the time had gone by for it, under the provisions of the said Revenue Act, to file any objections to the said assessment or valuation or tax with the assessor or with any officers of the said City and County of Denver; that the time to make any appeal from the decision or rulings of any officer having the said matter under his control or discretion had expired on the first day of January following said assessment, and there was no provision of law in the state of Colorado under or by virtue of which the said assessment, valuation or tax could be modified or changed; that under the provisions of the said Revenue Act, no officer or court of Colorado had any jurisdiction at law after the first day of January following such assessment to make any change or modification therein, unless the proper steps had previous thereto been taken by the party aggrieved to correct such modification or change; that the plaintiff is advised that the following provisions of the said Revenue Act of 1902 cover the right and power of the City and County of Denver to assess property of non-residents within the said city and county, to-wit:

Sec. 16. The moneys of non-residents, kept and used, loaned and invested within the state for profit, shall be subject to taxation in like manner as the moneys, credits and
13 effects of persons domiciled within the state.

Sec. 15. All property not expressly exempt by law shall be subject to taxation. The term property, as used herein, shall be held to include both tangible and intangible property.

Part of Sec. 13. The term 'intangible property' shall include rights, credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights, etc.

The term 'credits' shall include every claim and demand for money, labor or other valuable thing, etc.

Sec. 72. Except as otherwise provided herein personal property shall be listed and assessed in the county where it shall be on the first day of April in the then current year.

9. That on the first day of April, 1905, the plaintiff had no property within the City and County of Denver, except such as is included in the valuation of $3800, as shown upon the tax schedule filed by it with the county assessor on May 19, 1905.

10. That thereafter, to-wit, on May 11, 1906, the plaintiff made to the said county treasurer of the City and County of Denver a tender of the sum of $126.30, being the taxes and accrued interest for year 1905 on $3800, the amount of the valuation of property belonging to the Singer Sewing Machine Company, as per schedule filed with the assessor for that year; that as the said tender did not include the taxes on the amount to which the assessor had raised the valuation of the said company over and above the said sum of $3800, the said treasurer refused to accept the tender of $126.50, stating as a reason that the amount tendered did not cover the tax for the year 1905, as certified by the assessor; that the plaintiff was then and ever since has been ready to pay the said sum of $126.50,
14 and hereby offers to pay the same to the said treasurer, or to any person to be designated by him, or to bring the same into court and deposit the same in the registry of this court, for the use and benefit of the said county; that the same is the full amount due to the said county on the valuation of $3800, including interest to the 11th day of May, 1906, and the plaintiff has at all times been ready to pay the same but the plaintiff is advised that the amount of the tax claimed by the said City and County of Denver over and above the sum of $126.30 is excessive, illegal and levied upon alleged

property which the plaintiff did not have within the city and county of Denver during any of the time mentioned herein, which was subject to taxation by said City and County.

11. The plaintiff is informed and believes that the theory upon which the said City and County of Denver is proceeding to assess the plaintiff is, that by having a supervising agency located at Denver over a district covered by seven states and two territories, the plaintiff has become domiciled within the City and County of Denver, thereby subject to taxation in the same manner and under the same circumstances, and subject to the same provisions of law as a domestic corporation; but the plaintiff states that it is advised that it has no domicile outside of the state of New Jersey, where it is incorporated and organized, and that all notes, credits, bills receivable and evidence of debt owned and held by the plaintiff
15 are subject to taxation in the state of its domicile and not in the state of Colorado, through which some of its moneys, notes, obligations and bills receivable may be, for a few days, in passing from other states and territories, to its principal business office located in the said city of New York.

12. And the plaintiff is informed and alleges that before the plaintiff began to do business in the state of Colorado, and before the time any such taxes were claimed against the plaintiff, the Supreme Court of the state of Colorado had construed similar provisions in previous revenue acts of the said state, and that by such construction it was held that the notes and credits owned by non-residents of Colorado were not taxable within this state, but within the state where the said non-residents were domiciled.

13. And the plaintiff alleges and states, that the enforcement of the said assessment against it and the collection or attempted collection of taxes so assessed against the plaintiff as hereinbefore stated, would be illegal, unjust, and in violation of the constitutional rights of the plaintiff; that the notes, obligations and credits which it is sought to tax to the plaintiff in the state of Colorado were owned and held by the plaintiff at its domicile outside of the limits of the City and County of Denver, and beyond the limits of the state of Colorado, and were never at any time taxable in or by the City and County of Denver, or any of its officers in said city
16 and county; that the business of the plaintiff in the sale of said sewing machines purchased and sent from the states of New Jersey and Indiana for sale in the states of South Dakota, Montana, Idaho, Utah, Wyoming, Nebraska, Colorado and Texas, and after being so sold the transmitting of the proceeds of such sale to the principal office of the said

company in the city and state of New York, by transit through the City and County of Denver, were incident to commerce, being transacted by plaintiff domiciled in another state, with the citizens of the several states hereinbefore mentioned; that the effort to tax the said notes, obligations and bills receivable in the City and County of Denver is in violation of section 8, Article 1 of the Constitution of the United States, which confers on Congress the exclusive right "to regulate commerce among the several states," that the effort to impose the said tax upon the plaintiff, and to enforce the same against it in violation of section 2, article 4, of the Constitution of the United States, which provides that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" that the said attempt to impose upon and enforce the collection of said taxes against the plaintiff further violates the fifth amendment to the Constitution of the United States, which provides that "no person shall be deprived of property without due process of law; that the said attempt to impose upon and enforce the collection of the said taxes against the plaintiff also violates
17 the 14th amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

14. And the plaintiff further states that taxes levied under the said Revenue Act become due each year on the first day of January; that one half thereof becomes delinquent on the first day of March and that all thereof becomes delinquent on the first day of August in each year; that after the said taxes become delinquent they are subject to interest and penalties, and taxes levied upon personal property are collectible by distress and sale of any personal property owned by the person assessed, at the time that the treasurer seeks to collect the same.

15. And the plaintiff further states, that the defendant, as treasurer of the City and County of Denver, now threatens by a written letter addressed to the plaintiff, to proceed to collect the unpaid taxes on personalty of the plaintiff for the year 1905, to the amount as he says, of $2284.05, by the seizure of the plaintiff's personal property and sale of the same at public auction in the manner and form as provided by law, several sections of which are printed on the back of the writing containing the said threat; and the plaintiff believes that

unless restrained by the order and decree of this court
18 the said defendant will carry the said threat into execution.

16. And the plaintiff further states, that is is advised that it is entitled to invoke the relief and protection of a court of equity, because, it says, that by the same Revenue Act which authorizes certain officers therein named, by a process therein pointed out, to assess the valuation of personal property and to levy a tax thereon, and prescribing the method of enforcing collection thereof, there is also a provision made to protect the interests of the property owner and prevent such officers from acting oppressively, unjustly, or illegally; that under such provisions the property owner, in the event that the valuation of personalty is raised by the assessor above that put upon the property by the owner thereof, is entitled to a notice to be served upon such owner, personally, by mail, containing "a statement of any such change in valuation" and advising him that the assessor will sit and hear any and all objections to the assessment roll; that the said statute provides that such notice shall be so served "prior to the first Tuesday in August of each year by mail to each person, association or corporation whose property has been assessed at a valuation other than given in the schedule filed by such person, association or corporation;" that said statute also provides for an appeal to the county or district court on or before the first day of January, succeeding the date of such assessment;

that no such notice was served upon the plaintiff at
19 the time provided in said statute, or at any other time, and the plaintiff had no knowledge or information of any change in such valuation until after the 15th day of January, 1906, and after the right of appeal to the district or county court had gone by, and also after the assessor had parted with the possession of the said tax list and assessment roll, and had certified the same to the county treasurer for collection, and the said tax had become fixed and determined, on the record in the nature of a judgment and a lien upon all the real and personal property in the county belonging to the plaintiff; that the plaintiff is advised that when an act is passed by the legislature creating a right or a liability not known to the common law and without which act there would be no such right or liability, and by the same act a remedy is provided to enforce the rights or repress the wrongs which may be wrought under the provisions of the act, that such remedy, so provided for, is exclusive, and that if the circumstances of the case are such that a person who has suffered a wrong cannot invoke such remedy, then the wronged person has no

remedy whatever at law. And the plaintiff is advised that the statutes of the state of Colorado make no provision for the payment of taxes erroneously, wrongfully or illegally assessed or levied, to the treasurer of said county, or any other officer, under protest, and for the collection thereof by an action at law or any other proceeding, except in cases
20 of appeal from the decision of the county assessor under the provisions of section 94 of the said act, to take place on or before the first Monday in January following said assessment. It is provided that "before the appeal shall be allowed the petitioner shall pay to the county treasurer the amount of the tax levy pursuant to the said assessment, and in case the appeal shall succeed in the county or district court in whole or in part, the treasurer shall refund such tax, according to the judgment of such court. And in all cases where any tax so collected shall be refunded the taxpayer shall be entitled to receive interest on the amount refunded at ten per cent. per annum from the time of payment thereof." That by reason of the failure of the said county assessor to notify the plaintiff of the increase of assessment from $3800.00 to $66,300.00, the plaintiff, in addition to losing the opportunity of a hearing before such assessor and the taking of an appeal to the district court for the purposes of reviewing the action of the assessor on or before the first Monday in January following such assessment, loses also the privilege of paying the said tax and causing the same to be refunded, under the provisions hereinbefore mentioned.

And the plaintiff further says, that a portion of the tax levy of the said City and County of Denver for the year 1905, belonged to the state of Colorado; a portion belonged to School District No. 1 of the City and County of Denver; a portion for city purposes and a portion for county purposes; that by the said revenue act the county treasurer is required
21 "upon the last day of each month to pro rate the total amount of the taxes collected during the month to the several funds;" that the plaintiff is advised that after the said pro rating has taken place and the amounts have been apportioned to the several funds as so provided, the amounts thereof apportioned to the state fund and the amount thereof apportioned to the regular school district fund is thereafter subject to the order of the state officers and of said school district and is beyond control of the officers of the City and County of Denver and could not be refunded to the taxpayer by the City and County of Denver as the result of any action at law or other proceeding.

And the plaintiff further says that it had no knowledge or information or any reason to believe, nor were there any facts

which should have put the plaintiff upon inquiry to ascertain, that the said assessor had raised the assessed valuation of the plaintiff's property from $3800.00 to $66,300.00 or any other sum, and that the failure of the plaintiff to know or be informed that such increase in valuation had taken place was not through any neglect or fault of the plaintiff; that the plaintiff knew that the said Revenue Act provided that in the event of an increase of the assessed valuation of the plaintiff's property by the assessor over and above the valuation placed thereon by the plaintiff, then the said assessor was required by law to notify it, by mail, stating the amount of such increase of valuation; and the plaintiff resting upon
22 such provision of law made for the protection of the taxpaper, relied thereon and had no occasion to make inquiry as to whether such assessed valuation had been increased and did not learn thereof until long after the question of raising the value upon property had passed beyond the jurisdiction of the said assessor. And the plaintiff further says, that by reason of the neglect and omission of the county assessor to notify the plaintiff, as provided by the said Revenue Act that he had changed the valuation of the plaintiff's personal property as fixed by the plaintiff in its tax schedule from $3800 to $66,300 and of the other matters and things hereinbefore alleged, the plaintiff is deprived of any remedy at law to redress the wrong imposed upon the plaintiff in this case; that by reason whereof the plaintiff has no speedy and adequate remedy at law, and the threatened proceeding of the defendant, if executed, would work an irreparable injury to the plaintiff, unless restrained by the order of this court, and the plaintiff is compelled to invoke the protection of a court of equity to prevent such threatened injury.

To The End, therefore, that the plaintiff may have that relief which it can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit of which is expressly waived by the plaintiff, the plaintiff now prays the court, that inasmuch as the restraining process of said court is necessary to pro-
23 tect the plaintiff from immediate and impending loss and injury, the plaintiff prays that the court grant its gracious writ of injunction and enjoin the defendant from proceeding in any manner whatever to collect the said tax levied against the plaintiff for the year 1905, by distress and sale, or otherwise, and that a decree be entered by this court declaring the assessment and tax against the plaintiff for the year 1905 as to the valuation of $62,500 increased by the assessor over and above the sum of $3800 returned by the plaintiff for taxation, is null and void and that the same be held for naught

as against the plaintiff, or a lien upon any of the plaintiff's property in the City and County of Denver.

And if the plaintiff has not prayed for the proper relief, that it may have such other and further and general relief as would be just and proper under all the circumstances of the case.

May It Please Your Honors to grant to the plaintiff a writ of subpoena to be directed to the said William J. Fine, County Treasurer of the City and County of Denver, thereby commanding him at a certain time, according to the rules of this court, personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

R. H. GILMORE,
Solicitor for plaintiff.

24 (Endorsed): 4937. In the Circuit Court of the United States, in and for the district of Colorado. The Singer Sewing Machine Co., Plaintiff, vs. William J. Fine, Treasurer, etc., & City & County of Denver, Defendants. Bill Of Complaint. Filed Oct. 25, 1906, Charles W. Bishop, Clerk. R. H. Gilmore, Atty. for Plaintiff, 706-8 Exchange Bldg., Denver, Colo.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the District of Colorado.

The President of the United States of America, To William J. Fine, Treasurer of the City and County of Denver, and The City and County of Denver—Greeting:

You And Each Of You Are Hereby Commanded, that you appear before the Judges of the Circuit Court of the United States for the district of Colorado, at the City and County of Denver, in said district, on the first Monday in December next (it being the third day of December, A. D. 1906) to answer the bill of complaint of The Singer Sewing Machine Company of New Jersey, this day filed in the office of the clerk of said court, in said city and county of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

25 To The Marshal of the District of Colorado to execute and make due return.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court at the City and County of Denver aforesaid, this 25th day of October in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the 131st year.

(Seal U. S. Circuit Court) CHARLES W. BISHOP, Clerk,
By Alexander C. Hitzler,
Deputy Clerk.

Memorandum.

The above named defendants are hereby notified that unless they, and each of them, shall enter their appearance in the office of the clerk of said court, at the City and County of Denver aforesaid on or before the day to which the above writ is returnable, the bill of complaint will be taken against them as confessed, and a decree entered accordingly.

CHARLES W. BISHOP, Clerk,
By Alexander C. Hitzler,
Deputy Clerk.

26 Marshal's Return.

United States of America,
District of Colorado—ss.

Denver, Oct. 31, 1906.

I have duly executed the within writ, by delivering to William J. Fine, treasurer of city & county of Denver, The City & County of Denver, be delivering a true copy to Albion K. Vickery, clerk, and each of them, personally, a true copy of the within writ, at the place and time as follows, to-wit: As to ..... on the 30 day of Oct. A. D. 1906, at Denver, in Denver county.

This writ therefore returned executed as the law directs, this 30th day of Oct. A. D. 1906.

D. C. BAILEY, Marshal,
By D. C. Bailey, Jr., Deputy Marshal.

(Endorsed) No. 4837. United States Circuit Court, for the district of Colorado. In Chancery. The Singer Sewing Machine Company of New Jersey, vs. William J. Fine, Treasurer City & County of Denver et al. Subpoena Returnable to rule day, first Monday in December, A. D. 1906. Charles W. Bishop, Clerk,

By Alexander C. Hitzler, Deputy Clerk. Filed Oct. 31, 1906, Charles W. Bishop, Clerk. R. H. Gilmore, of Denver, Solicitor for complainant.

In the Circuit Court of the United Ctates in and for the District of Colorado.

The Singer Sewing Machine Company, of New Jersey, a
27 Corporation, Plaintiff,

vs.

William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver, Defendant.

Demurrer.

The defendants, William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver, not confessing any or all of the matters in the bill of complaint herein contained to be true as therein set forth, demur to the said bill of complaint for the reason and upon the ground that the same does not state such a case nor contain any matter of equity entitling the plaintiff to any relief against these defendants.

Wherefore, they pray judgment of the court whether they shall be compelled to further answer said bill of complaint and further pray to be hence dismissed and that they have and recover of and from the plaintiff their costs herein to be taxed.

WILLIAM J. FINE,
Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver.

By William B. Tebbetts, their solicitor.

I, William B. Tebbetts, of counsel for the defendants in the above action, do hereby certify that the foregoing de-
28 murrer to the bill of complaint herein is in my opinion well founded in law.

WILLIAM B. TEBBETTS,
Solicitor for defendants.

State of Colorado,
City and County of Denver—ss.

William Lawson, being first duly sworn on oath deposes and says, that he is one of the county commissioners of the city and county of Denver, one of the defendants in the above entitled action and that the foregoing demurrer to the bill of complaint therein is not interposed for the purpose of delay.

WM. LAWSON,

Subscribed and Sworn to before me this 27th day of November, A. D. 1906.

My commission expires October 4th, A. D. 1909,

(Notarial Seal) JOSEPH J. VICK ROY,
Notary Public.

(Endorsed) No. 4937. In Equity. United States Circuit Court. The Singer Sewing Machine Company of New Jersey vs. William J. Fine, Treasurer of the City and County of Denver, a corporation, and the City and County of Denver. Demurrer to Bill. Filed Nov. 28, 1906, Charles W. Bishop, clerk.

One Hundred First Day, November Term. Monday, April 15th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

The Singer Sewing Machine Company,
4937 vs. In Chancery.

29 William J. Fine, Treasurer of the City and County of Denver, and the City and County of Denver.

Bill for an injunction and for other relief.

This cause having heretofore come on to be heard upon the demurrer of the respondents to the bill of complaint herein, and was argued by counsel, R. H. Gilmore, Esquire, appearing as solicitor for the complainant, and William B. Tebbetts, Esquire, appearing as solicitor for the respondents, and was taken under advisement.

And thereupon, on consideration thereof, it is ordered by the court that the said demurrer be, and the same is hereby, overruled.

One Hundred Sixteenth Day, November Term. Monday, May 6th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

The Singer Sewing Machine Company
4937 vs. In Chancery.
William J. Fine, Treasurer of the City and County of Denver, and the City and County of Denver.

Bill for an injunction and for other relief.

This cause coming on now to be heard, Fred W. Parks, Esquire, appearing as solicitor for the respondents; And thereupon, on his motion,

It is ordered by the court that the time heretofore allowed the respondents for answer herein be, and the same is hereby, enlarged and extended to and including the June, 1907 rule day.

30 In the Circuit Court of the United States in and for the District of Colorado.

The Singer Sewing Machine Company of New Jersey, a corporation, Plaintiff,

vs.

William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver, Defendants.

Answer.

Now comes the defendants and for answer to the bill of complaint on file herein alleges:

That the bill of complaint does not state such a case, nor contain any matter of equity entitling the plaintiff to any relief against these defendants.

The defendants admit that the plaintiff is a corporation organized under the laws of the state of New Jersey, and that the amount in controversy exceeds the sum of $2000.00.

Admit that the plaintiff is engaged in selling Sewing Machines and has an established agency in the City and County of Denver, having sub-agencies in the district comprising the states of Montana, Idaho, Utah, Wyoming, Colorado, So. Dakota, Nebraska and Texas, and the Territories of New Mexico and Arizona, and that such machines are sold for cash and on credit and that credit notes and other obligations are taken in the sale thereof, and that such notes and obligations are received and registered at the Denver Agency.

31 Admit that the plaintiff did on or about the 19th day of May 1905, deliver to the assessor of the city and county of Denver a tax schedule with a net return thereon of $3800.00 and that it is the duty of the owner of all personal property to return such tax schedule.

Admit that section 93 and section 94 of the Revenue Act is as set forth in said bill of complaint.

Admit that for the year 1905 the assessor of the city and county of Denver increased the assessed valuation of the plaintiff's property as returned by the plaintiff, in the sum of sixty thousand dollars ($60,000).

Admit that the defendant, Fine, has no discretion by the statutes of Colorado in reference to the collection of taxes, and that it is his duty to collect the same, and that he has no power to make any change or modification in the tax collection as returned by the assessor.

Admit that the treasurer notified the plaintiff, in accordance with law, of the amount of taxes due and owing by it.

Admit that sections 13, 15, 16, and 72, of the Revenue Act of 1902, is as set forth in plaintiff's bill of complaint, and admits the tender of one hundred and twenty-six and 30/100 dollars ($126.30) on May 11, 1906, as alleged in said bill of complaint; and admits that the taxes levied against the plaintiff became due on the first day of January, 1905, and one half thereof became delinquent on the first day of March, and that all of said tax became delinquent on the first day of
32 August and are subject to interest and penalties; and that personal taxes are collectible by distress, and that the defendant treasurer has made demand for said taxes and threatens to proceed to collect the unpaid tax of twenty-two hundred and eighty-four and 05/100 dollars ($2284.05).

Admit that under the revenue laws of this state the plaintiff is entitled to notice of any raise in the assessed valuation and that the plaintiff has failed to take advantage of the provisions of said revenue laws as alleged in paragraph 16 of said bill of complaint.

Admits that a portion of the tax levy of the City and County of Denver for the year 1905 belonged to the state of Colorado, and a certain portion to the school district and a certain portion for city purposes and a certain portion for county purposes.

Denies each and every, all and singular, the other allegations in said bill of complaint contained, save and except, those not herein expressly admitted.

For a further defense, the defendants allege that the plaintiff is a corporation organized and existing under the laws of the state of New Jersey for the purchase and sale of sewing machines, and that it is operating a general agency for the sale of sewing machines in the state of Colorado with sub-agencies throughout the districts comprising the states of Montana, Idaho, Utah, Wyoming, Colorado, So. Dakota, Nebraska, and

Texas and the territories of New Mexico and Arizona, and that the central point and agency for said territory is the
33 city and county of Denver in the state of Colorado, and that all of the business done by the plaintiff company in the territory hereinbefore mentioned is done through the general agency in the city and county of Denver, and that all remittances and all money and property belonging to the plaintiff and used in the operation and conduct of its business in the territory comprising ten states and territories as hereinbefore alleged is registered, held and used by the general agency of the plaintiff company in the city and county of Denver, and that all moneys received from the sale of machines in the ten states and territories comprising this district is remitted to the Denver office of the plaintiff and deposited in banks in the city and county of Denver.

Defendants further allege that the amount of personal property, including moneys on hand and deposited in banks, and notes, credits, and other obligations representing money owned by the plaintiff and received from its business through its Denver general agency, aggregated during the year 1905, more than one million dollars ($1,000,000) and that the average amount of personal property, money, notes, and credits on hand held, kept and used by the plaintiff company in the city and county of Denver during the year 1905 exceeded sixty thousand dollars ($60,000) and that by reason thereof it was its legal duty to pay taxes to the city and county of Denver and state of Colorado upon an assessed valuation of sixty thousand dollars ($60,000) for personal property, in ad-
34 dition to the amount returned in its schedule.

Defendants further allege that it was the duty of the plaintiff to pay the taxes as claimed by the treasurer and then make application to the Board of County Commissioners of the City and County of Denver for relief, if it believed it was unjustly assessed, in accordance with the statutes in such case made and provided, and defendants allege that the statutes of this state afford to the plaintiff ample remedy and protection, and that the plaintiff has failed to take advanage of the provisions of the laws of this state which are adequate in the premises.

Wherefore, defendants pray they be hence dismissed with costs in this behalf expended.

FRED W. PARKS,
Solicitor for defendants.

(Endorsed): No. 4937. In the Circuit Court of the United States in and for the district of Colorado. The Singer Sewing

Machine Company of New York Jersey, a corporation, plaintiff, vs. William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver, defendants. Answer filed May 21, 1907, Charles W. Bishop, Clerk, Fred W. Parks, Solicitor for defendants.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States within and for said District.

35 The Singer Sewing Machine Company of New Jersey, a Corporation, Complainant,
No. 4937. vs. Equity.
William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the said City and County of Denver, Respondents.

Replication.

This replicant, the Singer Sewing Machine Company of New Jersey, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the respondents, William J. Fine, treasurer of the City and County of Denver, and the City and County of Denver, for replication thereto saith that it doth and will aver maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

36

R. H. GILMORE,
Solicitor for complainant.

(Endorsed): Equity No. 4937. In the Circuit Court of the United States within and for the district of Colorado. The Singer Sewing Machine Company of New Jersey, a corporation, Complainant, vs. William J. Fine, Treasurer of the City and County of Denver, a municipal corporation, and the City and County of Denver, Respondents. Replication. R. H. Gilmore, Atty. for complainant, 706-8 Exchange Bldg., Denver, Colo. Filed Jul. 24, 1907, Charles W. Bishop, Clerk.

Forty-sixth Day, November Term. Wednesday, January 6th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

The Singer Sewing Machine Company
4937. vs.
William J. Fine, Treasurer of the City and County of Denver, and the City and County of Denver.

In Chancery Bill for an injunction and for other relief.

This cause coming on now to be heard, R. H. Gilmore, Esquire, appearing as solicitor for the complainant, and Fred W. Park, Esquire, appearing as solicitor for the respondents;

And thereupon, it is ordered by the court that the complainant close the taking of testimony on its behalf on or before the fifteenth day of February, A. D. 1909, and that the respondents close the taking of testimony on their behalf on or before the first day of April, A. D. 1909.

37 United States of America,
District of Colorado—ss.

In the Circuit Court.

The Singer Sewing Machine Company, a corporation, Complainant,
No. 4937. vs. In Equity.
William J. Fine, Treas., etc., et al., Respondents.

Be It Remembered, that on the 3rd day of February, A. D. 1909, at ten o'clock a. m. and at 2 o'clock p. m. of said day, by the mutual agreement of the parties hereto, said parties appeared before me, Sanford C. Hinsdale, an Examiner in Chancery of the Circuit Court of the United States, for the district of Colorado, at my office, No. 803 Continental Building, in Denver, Colorado, to-wit, the complainant in said cause, by its solicitor, R. H. Gilmore, Esq., and the said respondents, by their solicitors, Milton Smith, Esq., and Charles R. Brock, Esq.

And on this day, came before me also: William C. Stewart, a witness, of lawful age, to testify, and the truth to say, as a witness on behalf of complainant, in the suit and matter of controversy above mentioned and now pending and undetermined in said court; and the said witness, having been by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth, in the matter
38 and suit in controversy aforesaid, was examined by me, on oral interrogatories propounded to him by counsel, as in his deposition following, appears, that is to say:

Index.

	Dr.	Cr.	Re Dr.	Re Cr.
William C. Stewart	3	11	14	14
			20	21
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William C. Stewart, a witness produced on behalf of complainant, in answer to interrogatories propounded to him, testified as follows:

Direct Examination

By R. H. Gilmore:

Q. What is your name? A. William C. Stewart.

Q. What is your occupation?

A. Chief Clerk of the Singer Sewing Machine Company Central office, at Denver.

Q. How long have you been in that position?

A. Seven years—eight years.

Q. Were you such chief clerk in the year 1905? A. Yes.

Q. You have mentioned the Central Agency of the Singer Sewing Machine Company, what do you mean by the Central Agency?

A. The Denver Central Agency controls the business for the Singer Sewing Machine Company in the several states.

Q. What states are they?

39 A. Colorado, Wyoming, Montana, part of South Dakota, part of Idaho, Utah, the territories of New Mexico, Arizona, and a small portion of Texas.

Q. Now, these states which you have mentioned, state how the business of your company is done therein, with respect to the central office?

A. Well, we have stores located at different points in the several states and territories, and in those stores salesmen are employed to sell sewing machines and collect in the cash. Does that cover it?

Q. Yes. In what relation are these stores to this Central Agency Office?

A. The business done at these stores is turned in to this Central Office.

Q. How often are reports made? A. Weekly.

Q. From all the offices? A. Yes.

Q. What is done with those reports?

A. They are checked in the Central Office and returned to the stores.

Q. Is there anything that accompanies those reports?

A. Yes, leases or contracts for machines sold on time, and money collected on accounts, or for cash sales.

Q. What is done with the money?

A. It is remitted to New York weekly.

Q. What is done with these contracts and leases?

A. They are sent to New York once a month.

Q. Is any of the money retained in the Denver office?

A. None.

40 Q. Are any of these leases or contracts retained in the Denver office? A. No.

Q. Was that the way in which the business was done during the year ending March 31st, 1905? A. Yes, sir.

Q. What is the business of the Singer Sewing Machine Company?

A. To sell sewing machines; selling machines and parts.

Q. Does the Singer Sewing Machine Company manufacture sewing machines? A. No.

Q. Where does it get its machines?

A. From Elizabethport, New Jersey, and South Bend, Indiana. Do you want the name?

Q. Yes? A. From the Singer Manufacturing Company.

Q. Then the Singer Manufacturing Company manufactures the machines and sells them to the Singer Sewing Machine Company, and the Singer Sewing Machine Company disposes of the machines to customers? A. Yes.

Q. These machines at these several stores in the several states, state how they come to the stores, and how they are shipped, and where from?

A. They are shipped from South Bend, Indiana, in car load lots, to the most central and convenient point of distribution to the men.

Q. And then, what is done with them? You used the word distribution.

A. Yes, we do not handle them the same from every

41 place. Some places we ship a car load of machines, and re-ship them from the car, and in other places we put them in the stores and ship them out later.

Q. These car loads, they are distributed from the point to which they are shipped in the several places in the different states? A. Yes.

Q. Direct, from Elizabethtown, New Jersey and South Bend, Indiana? A. Yes.

Q. And when they are sold, the contracts and leases are sent to Denver with the money?

A. Sent to Denver each week with the men's reports.

Q. And then sent on to New York, as you have before stated?

A. Yes, sir.

Q. Is this a constantly recurring process, kept up during the year? A. Yes, it does not vary at all.

Q. Is the Singer Sewing Machine Company a corporation?

A. Yes.

Q. Where was it incorporated? A. In New Jersey.

Q. Are these notes or contracts or leases made payable in Denver?

A. No; made payable at the store point. I will explain that. We have stores located at the most prominent towns, or most convenient towns for looking after our business. And the men work from the stores, outside, in the country,
42 and make report to the store and turn in the leases to that store, and all the leases of the different men at that point are sent to the Denver Agency each week.

Q. You might mention, Mr. Stewart, a few of the prominent stores, say, in South Dakota.

A. That is a poor place to pick out because we have only one there.

Q. Well, South Dakota? A. At Lead, South Dakota.

Q. In Wyoming? A. Cheyenne.

Q. And in Montana?

A. Billings, Helena, Butte, Anaconda, and Great Falls.

Q. In Idaho? A. Pocatello.

Q. In Utah? A. Ogden, Salt Lake, Provo, and Richfield.

Q. And so on in other states, the same way? A. Yes.

Q. When machines are needed at one of these store points, who orders a new supply, a new car load?

A. The store orders from us.

Q. Do you keep a bank account here? A. Yes.

Q. Do you remember the average amount of your deposits, average monthly amount of deposits in the bank deposited by you during the year ending March 31st, 1905?

A. At the average, about $24,000.

Q. What was the average monthly, balance, as shown by the bank books? A. $1250.

43 Q. What was the average monthly balance as shown by your own books.? [—]. $1071.

Q. Now, was there, practically, or really any balance whatever at these times; that is, considering the checks that were out?

A. Well, that would depend on when the month ended. We remitted each week to New York, regardless of the date.

Q. So that, if the month came in in the middle of the week—

A. —there might be a balance.

Q. But if the week and the month ended at the same time, then there would be no balance?

A. No balance, none at all.

Q. So that, practically, you kept no balances in the bank, except for the amount of the checks that were out?

A. We tried not to have anything here at the end of each week.

Q. Where did these several parties that owed the money on leases and contracts, where did they reside?

A. Almost everywhere.

Q. Well, in the states where the business was done?

A. In the states where the business was done.

Q. I will show you a paper which purports to be a copy of a tax schedule of 1905, except the figures, "60,000"; you may state what that is.

A. It is the tax schedule for the Singer Sewing Machine Company.

44 Mr. Gilmore: It was made out in our office. I will offer this in evidence, and let the record show that counsel for defendant does not object to it because it is a copy.

The Commissioner: It is marked Exhibit A, Complainant's Proofs.

Mr. Brock: As I understood you, this exhibit is a copy of the return made by or on behalf of the complainant, with the exception of the figures, "60,000", which now appear?

The Witness: There is the "2500" in figures.

Mr. Gilmore: Yes, I will add, also with the exception of the "2500".

Q. Examine that schedule and state whether the item placed against the figures, $3500 and $300 constitute all the property owned by the company, in this [court] at the time of rendering that schedule.

A. Yes, the returns were made by F. H. Roe, the agent.

Q. Were you related to the company's affairs at that time and to Mr. Roe, personally, so that you personally knew, and now know, that that sum was correct? A. Yes.

Q. I will show you complainant's exhibit B; you may state, in a general way, what Exhibit B is.

A. A notice from the treasurer that there was due $2154.75.

Mr. Gilmore: The notice offered in evidence and marked by the Commissioner, Exhibit B.

45 Q. I observe that the notice is dated, "Denver, Colorado, 1/15/1906;" state whether that was the first notice or knowledge or information that your office had of the raising of the tax schedule. A. Yes.

Q. Those figures on this card, Exhibit B, the figure "1", and then a diagonal, straight mark, and the figures "15" on the right hand of the card, between the words, "Colorado" and the words or figures, "1906", what do these figures mean?

Mr. Brock: I object on the ground that the Exhibit shows for itself.

A. It is the date of the notice.

Q. When was that notice received at your office?
A. I can not tell the actual date, but within a few days of the date of it.
Q. Well, in what day and year? A. In January, 1906.
Q. Had you received any previous notice?
A. Notice of what?
Q. Of the increase? A. No.
Q. I will show you complainant's Exhibit C; state, in a general way, what that is.
A. It is a notice that unless we paid our taxes—do you want the amount?
Q. No.

Mr. Brock: We object to the testimony as to what the exhibit is. It shows for itself.

A. A notice from the County Treasurer.
46 Q. Was that notice ever received by your company, your office? A. Yes, sir.
Q. When was it received? A. Sometime in October, 1906.

Mr. Gilmore: I offer in evidence, Exhibit C.

Q. I will show you Complainant's Exhibit D; Mr. Stewart, examine this exhibit, and state whether you were present when that Exhibit D was delivered to the Deputy Treasurer, at the Court House. A. Yes, I was.

Mr. Gilmore: Exhibit D offered in evidence.

Q. Were you present when that writing was put upon that letter by Mr. Howland, as Deputy Treasurer? A. Yes.
Q. You saw him write that there? A. Yes, sir.
Q. State whether that sum, $126.50 was then tendered to the Treasurer? A. It was.
Q. And after it was tendered, who wrote that writing on the margin of the paper? A. He did.
Q. I will show you Exhibit E. You may state, in a general way, what that is, for the purpose of identification.
A. A letter to the Treasurer acknowledging receipt of the notice that taxes were due.

Mr. Gilmore: Exhibit E offered in evidence.

Q. I observe from the notices and letters which you have received that the assessor, subsequent to the making of
47 the schedule, raised the amount of the valuation of your company in this city and county, in the sum of $62,500; you may state whether your company had any property in this county at that time to the amount of $62,500, or any other sum in excess of $3800. A. No.

Q. I observe on this schedule, that the figures "60,000", under the heading, "Valuation of Personal Property, by Assessor," is set against a bracket containing five items; did your company have at that time in its possession, in the city of Denver, or at any time during the year ending the 31st of March, 1905, promissory notes, bonds, debentures, and other writing, evidence of indebtedness, belonging to or payable to your company, except as you have hereinbefore stated. A. No.

Q. Did you have any book accounts and other accounts not evidenced in writing, except as you have hereinbefore stated. A. No.

Q. Did you have any National Bank stock during that year, in your office in Denver? A. No.

Q. Did you have any deposits in banking institutions in Colorado, during that period, except as you have hereinbefore mentioned? A. No.

Q. Did you know anything about the bank deposits in banking institutions outside, deposited by your company?

A. We might have an account at the store.

48 Q. Do you know anything about the deposits in the home office? A. No.

Q. Did this office keep any bank account outside of the city of Denver during that year? A. No.

Q. Did you have any other property, of any kind, owned or held by your company, not included in the $3800 which you have just mentioned? A. No.

Cross Examination

By Mr. Brock:

Q. What are your duties as clerk of the company, at this office Mr. Stewart?

A. I have general supervision of the entire office.

Q. Did you hold that position on the 19th of May, 1905?

A. I did.

Q. What position did F. H. Roe hold at that time?

A. He was the agent.

Q. Was he in service under your direction or were you under his control? A. I was under his.

Q. Is he still in charge of the business at your place?

A. No.

Q. How many stores did your company have in the state of Colorado, within the year, or during the year that ended March 31st, 1905?

A. I can not be positive without looking it up. I think, seven.

49 Q. Where were these stores located?

A. At Denver, Colorado Springs, Pueblo, Trinidad, Leadville, Grand Junction and Boulder. There may be more; I know we had that number.

Q. All seven of these stores were being conducted during that year ending March 31, 1905? A. Yes.

Q. What stock of goods did you have at these stores?

A. I do not understand.

Q. (Question read.)

A. Sewing machines.

Q. Did you keep any other articles of merchandise except sewing machines? A. Needles and parts for machines.

Q. What was the value of the stock which you generally had in the Denver store during that year?

A. As returned on the tax account?

Q. I asked for the value of the whole, apart from any return. A. Between three and four thousand dollars.

Q. In the Denver store? A. Yes.

Q. What was the value of the stock that you had at Colorado Springs, throughout the same period of time?

A. I can not tell you, off-hand, but possibly five hundred dollars.

Q. Well, was it more or less than five hundred?

A. Well, it fluctuates; I could not say; it might be less.

Q. And might be more?

A. Hardly likely, because that is a good stock for a
50 store of that size.

Q. At Pueblo?

A. Possibly a little more than Colorado Springs.

Q. How much more?

A. Well, I could not say, but it would not be much more.

Q. Trinidad? A. $750 would be the maximum.

Q. Leadville?

A. Between three and four hundred dollars.

Q. Grand Junction? A. $250.

Q. Boulder? A. $200.

Q. How many men did you have in charge of the business in Denver? A. In charge of the business?

Q. Here in Denver, yes.

A. One man in charge of the store.

Q. You say you operated in seven states? A. Yes.

Q. Territories? A. Yes.

Q. From Denver? A. Yes.

Q. Were remittances from other states within your territory made to your office? A. Yes.

Q. What were the states and territories within the territory embraced by your agency?

A. (Witness reading from memorandum) Montana, part of Idaho, part of South Dakota, Wyoming, Utah, Colorado, part of Nebraska, part of Texas, and the Territories of New Mexico and Arizona.

Q. Did your office here in Denver receive a remittance
51 from each Colorado store from week to week?

A. Yes, if there was anything to remit.

Q. What was the average remittance which you received here in Denver, on account of sales made from the Denver store?

A. I could not tell you; I would have to look that up.

Q. I would like to have that information, Mr. Stewart.

A. Well, I will get it for you, and answer that question.

Q. What was the average amount, during the year in question, which you received from the store at Colorado Springs:

A. I can not give that just now.

Q. Well, please get it. Can you have it by two o'clock this afternoon? A. I think so.

Re-direct Examination

By Mr. Gilmore:

Q. Does each store, in each one of these places, hand in a schedule of property for taxation in each county where they are? A. It is handed in by this office, generally.

Q. It is handed in to the several assessors in the several counties? A. Yes.

Q. So that the goods that were on hand, the average amount, at Colorado Springs, was handed to the assessor of El Paso County? A. Yes.

52 Q. And the goods on hand at Pueblo were handed to the assessor of Pueblo County? A. Yes.

Q. And so on, through the state? A. Yes.

Q. And were the goods taxed that were on hand in the several other counties, where the goods were, in the several other states? A. Yes.

Q. Taxed in the places where the goods were?

A. Yes, sir, in each county.

Re-cross Examination

By Mr. Brock:

Q. That was simply the goods in stock? A. Yes.

Q. Did not include any moneys that came from these stores? A. Oh, no.

Q. Nor did it include any leases or notes that came from these stores? A. No.

An adjournment was thereupon had until two o'clock, of the same day, February 3rd, 1909.

February 3rd, 1909.

2 o'clock P. M.

Said parties met pursuant to adjournment.

Present as before.

And, thereupon, the re-cross examination of William C. Stewart was resumed by Mr. Brock:

53 Mr. Gilmore: The witness wishes to correct his statement in regard to the names and numbers of the stores which he gave, before adjournment, as he discovers, upon looking over his books, that there were more stores, at the time, than he had in mind, when he gave the statement, this morning.

Q. In addition to those stores mentioned this morning, what stores had you in Colorado?

A. Stores at Golden, Fort Collins, Alamosa, La Junta and Canon City.

Q. What was the average value carried at these additional stores, in the year 1905, or rather, for the year ending March 31st, 1905? A. From $150 to $250.

Q. Now, as I understood you this morning, all of the moneys collected from these various stores in Colorado, and throughout the other states and territories in which you were doing business, were turned in to the Denver office? A. Yes.

Q. I will ask you if I understood you correctly, when you say that all notes and leases and other evidences of debt, if any, taken at these various stores, in the various states and territories, during the year which ended March 31st, 1905, were likewise sent to your office in Denver?

A. Yes, they were.

Q. Now, I will ask you to state what amount of money was turned into your office in Denver, from the various states and territories, during the year ending March 31st, 1905.

A. $297,000.

54 Q. Now, how much was collected by the Denver office, from the territory in and around Denver?

A. I can not tell you.

Q. Well, can you give the aggregate amount of money which the Denver office received on account of the business transacted in and around Denver, by your office, including the $297,000. which came from the other stores?

A. No, I can not tell where it came from.

Q. Do I understand you that the $297,000 which you have mentioned, included the total amount of money collected or

paid into your office here in Denver, during the year which ended March 31st, 1905?

A. That was all the money which we received.

Q. What did you do with the money as it was received?

A. We deposited it in the bank.

Q. Then during the course of the year, you received, on account of the plaintiff company and deposited in the bank the aggregate sum of $297,000? A. Yes.

Q. During that same period of time, what was the full value of the notes and leases; and the other evidences of debt, which you received, on account of the plaintiff company, at the Denver office? A. About $300,000.

Mr. Gilmore: Notes and leases and contracts.

A. Yes, but the money, or part of the money, applied
55 on those same leases or contracts.

Q. How much money which you received was in payment on these notes or leases?

A. I can not tell you.

Q. Well, can you state the value of the notes, leases and evidences of debts which you did receive, in excess of the $297,000 in cash? A. Possibly $10,000.

Q. Do you mean to say that as much as $287,000 of the cash which you received was in payment of these notes of $300,000? A. Yes.

Q. Do you make that as a statement of fact or as a mere approximation?

A. I can not tell the amount from memory, but I do not think it was more than $10,000 gain on our contract accounts that year.

Q. In other words, during that particular year, you collected, within a few thousand dollars, the whole of the $300,000 taken in notes and leases? Mr. Stewart, I am not attempting to confuse you. Do you mean to say that the $287,000 cash you received was on account of notes which you took during that particular year?

A. I mean to say that the gain on our leases or contracts that year was approximately $10,000.

Q. Was any proportion of this $297,000 paid into your office, during the year which ended March 31st, 1905, on account of notes or leases which your company had taken during the previous year or previous years?

56 A. Yes, possibly.

Q. Mr. Stewart, what I want to know is this: how much money you received and handled in your Denver office during this year, and then I want to know the amount of notes

and other evidences of debt, which you likewise handled during this year in question.

A. Well, we received contracts and notes or leases, aggregating about $300,000, and we received about $297,000 in cash. I can not tell on what leases that money was paid.

Q. What did you do with these notes and other evidences of debt, when they were received?

A. Checked them, and forwarded them to the executive office in New York.

Q. As they were paid, where were the payments made?

A. The payments were made where the lease was drawn up, or to the store.

Q. From which the machine may have been purchased?

A. Yes.

Q. Then you are not able to state how much of the $297,000 was actually credited on the notes, etc., aggregating $300,000, and which you received during the year in question.

A. No, I can not tell that.

Q. How often did you make remittances of these notes to your Home Office, as you designated? A. Monthly.

Q. And the cash you remitted weekly?

A. Every Saturday.

57 Q. In that way you remitted to the Home Office in the course of the year, in notes, leases, contracts and cash, the aggregate sum of about $597,000?

A. Yes. Please read the question again.

Q. (Question read.) A. That meant, less the expenses of the Denver office, or other moneys paid out.

Q. Then, you did not remit to the Home Office the whole of the money which you received?

A. No, we paid the expenses of this office out of it.

Q. Less the expenses of this office in Denver, you remitted in notes and cash, the aggregate sum of $597,000? A. Yes.

Q. Now, in making this list for the assessor, for the year in question, you did not take into consideration this money, and these notes, about which you have just testified? A. No.

Q. Did you use Denver as a distributing point for any of your machines or other property?

A. Yes, for points near by.

Q. For any points without the state? A. No.

Q. Only within the state of Colorado? A. Yes.

Q. In making this assessment, for the year in question, did you include, in the list, as prepared, the machines which you had had on hand, in that way, for distribution?

A. I do not recall whether we had a ware-house then. In any event, we made returns on the stock in Denver, whatever it may have been.

Q. Did that include merely what you had in the Den-
58 ver store, or did that include what you had in Denver for shipment to other points to other stores.

A. Well, I do not recollect whether we had a warehouse here or not.

Q. Have you made any application, or has the complainant ever made application to the Board of County Commissioners for relief in any way on account of this alleged erroneous assessment?

Mr. Gilmore: I object to that as immaterial, irrelevant, and because the law which provides for making application to the Board of County Commissioners was repealed before this action was commenced.

A. I do not remember whether there was, but if there was, it was through Judge Gilmore.

Q. Then you are unable to state whether any appeal was prosecuted from any decision of the Board of County Commissioners, of course?

A. I can not state, positively.

Re-direct Examination

By Mr. Gilmore:

Q. If there were any sewing machines in the ware-house on the 31st day of March, 1905, state whether they were included in your schedule? A. No.

Q. Now, you speak of the expenses of the Denver office, I will inquire whether you paid the freight on all these machines, whether that is one of the expenses of the Denver office?

59 A. We pay the freight on all car load shipments.

Q. From the east?

A. Yes, regardless of the point to which the cars go.

Q. That is one of the expenses of the office?

A. No, because we charge the store with it afterwards.

Q. Well, that same money that you pay on freight, you do not ship to New York? A. No.

Q. Then, that money comes out of the amount you send to New York; that money comes out of the remittance?

A. That money comes out of the remittance we get from the stores.

Q. So that reduces the amount which you receive from the stores? A. Yes.

Q. Now, is there any way in which you can tell, when you receive a lot of money from the stores, or by which you can

tel!, now, whether the money you received from the stores was collected on old leases or on current leases?

A. No, it is impossible to tell.

Q. Now, this money, the $297,000 which was deposited in the bank, did that money remain in the bank?

A. It was remitted to New York, weekly.

Q. On every Saturday? A. On every Saturday.

Q. Do I understand that the stores that made the
60 leases and contracts collected the money on them?

A. Yes.

Q. And then they remitted to you, and you remitted to New York? A. Yes.

Q. Do you remember whether it was you or Mr. Roe, or both, that made up this schedule? A. I believe we both did.

Q. I will ask you whether you did not also make it up, in conference with your attorney? A. Yes, we did.

Q. And it was intended to include all the property you had in the county? A. Yes.

Re-cross Examination

By Mr. Brock:

Q. You say the different stores were collecting, all the while, on leases; that means they were collecting on leases taken in the previous years, as well as on leases taken in the year in question? A. Certainly.

Q. Was the title to all the machines sold during the year retained in your company?

A. Yes, the machines were simply on leases.

Q. The machines were not, in fact, sold, but simply leased to the individual who desired ultimately to become the owner of the machine?

A. Well, in some cases, we sold them on notes.

Q. What was your custom? A. Both, lease and notes.

By Mr. Gilmore: And cash?

61 A. And cash, of course.

Q. Can you tell the value of the machines to which your company retained title and which were in the state of Colorado during this year in question?

A. No, I can not tell you that.

Q. It amounted, however, to a large sum?

A. Yes, it would be quite a sum.

Q. Amounted to $100,000? A. I really can not say.

Q. What was the value of machines here in Denver to which you held title, during that year? A. I could not say.

Q. Well, did you pretend to include those machines to which you so held title? A. No.

Q. —In the return which you made? Is it not a fact, Mr. Stewart, that you had during the year in question, machines scattered throughout the city and state, which had been delivered in previous years, as well as those which were delivered within the year in question, and to which you still held title?

A. We had machines out on lease.

Q. And you did not pretend, either in this account, or in the accounts stated, to include any of the machines, in any of the returns that were made? A. We did not.

Q. Can you approximate the value of the machines which you had in this condition during the year in question?

A. No, I can not.

62 Q. Well, would it amount to $300,000 in Colorado?

A. I do not know, I would not say.

Re-direct Examination

By Mr. Gilmore:

Q. I will ask you whether this disposing of machines on the lease plan was not your method, to a considerable extent, in selling your machines? A. Yes.

Q. And the lease plan was adopted as security? A. Yes.

Q. For the payments? A. Yes.

Re-cross Examination

By Mr. Brock:

Q. You mean that in your business way of looking at things, the best way was to retain title to the property?

A. Well, I am not prepared to say why they adopted that method, but that is the method they adopted.

Q. Whatever the purpose may have been, they did retain title? A. The contract was called a lease.

W. C. STEWART.

Subscribed in my presence and sworn to before me this 5th day of February, 1909.

SANFORD C. HINSDALE.
U. S. Commissioner.

And thereupon the hearing was adjourned until further notice.

63 United States of America,
District of Colorado—ss.

I, Sanford C. Hinsdale, duly appointed Examiner in Chancery, by the Circuit Court of the United States, for the District of Colorado, do hereby certify that on the day mentioned in the proceedings and deposition in this case, I was attended by the counsel and witness aforesaid, at my office, No. 803 Continental Building, Denver, Colorado; that said witness, to wit,

William C. Stewart, was first duly sworn by me, according to law, as a witness in behalf of the complainant in the suit or cause in the caption hereto mentioned, and by the consent of the parties by their said solicitors, the examination and deposition of said witness was stenographically written down, and afterwards typewritten; that the said examination was had in the presence of the solicitors of the parties who appeared herein; and that said deposition after being completed and typewritten was read over by the witness deposing the same and was duly signed and sworn to by said witness so making and signing the same.

I further certify that the exhibits marked A to E, inclusive, complainant's proofs, were duly introduced before me in behalf of complainant, during the taking of said deposition, and they are herewith returned and filed with my report.

64 I further certify that the foregoing is a true statement of all the proceedings had in the matter of taking testimony on behalf of complainant herein.

SANFORD C. HINSDALE,
Examiner in Chancery.

65 Exhibit No. A.
Complt's Proofs,
S. C. Hinsdale, Examiner.

CHART

TOO

LARGE

FOR

FILMING

66

Exhibit No. B.
Complt's Proofs,
S. C. Hinsdale, Examiner.

Office of Treasurer City and County of Denver.

Court House
Schedule No. S. 2067.

Denver, Colorado, 1/15, 1906.

You are hereby notified that the following taxes assessed in your name for the year 1905 are now due.

Personal Property,..	Valuation $66300.00,	Tax,	$2154.75
Real Estate,	Valuation $.....,	Tax,	$.....
Military Poll, ...,		Tax,	$.....
	Total,		$2154.75

This statement is for General Taxes only.
Remit only Bank Drafts, Express or P. O. Money Orders.
Bank Drafts will be credited when paid.
Taxes due January 1, 1906.
Interest charged after February 28, 1906,

Return this card with Remittance and Postage.

Respectfully, C. W. BADGLEY,
Treasurer City and County of Denver.

(On the reverse side is the following):

The space above is reserved for postmark.

Postal Card.

The space below is for the address only.

SINGER SEWING MACHINE CO.,
R/1552 w/9 ~~628 16th St.~~,
City.

Exhibit No. C.
Complt's Proofs,
S. C. Hinsdale, Examiner.
Examiner.

Tax 1905.

Treasurer City and County of Denver,

Make all drafts, checks, money orders and Postal Notes payable to order of Treasurer City and County of Denver.

W. J. FINE, Treasurer,
Court House,

67 No. 2067 Denver, Colo., Oct. 1, 1906.

Singer Sewing Machine Co.,
628—16 St.

Your personal tax for the year 1905, amounting to $2284.05, is delinquent, and unless paid at once I will be obliged to enforce collection of same according to law. If you compel this course the expense will greatly exceed the amount now demanded.

Your Attention is Directed to the Charges and Penalties Prescribed by Law, and Printed on the Back of This Notice, to Which You Will be Subject if it Becomes Necessary to Enforce a Collection of Your Unpaid Personal Taxes.

Respectfully,

W. J. FINE,
Treasurer City and County of Denver.

Tax	$2154.75
Interest	$ 129.30
M. Poll	$
Total	$2284.05

(See Over)

Session Laws, 1902, page 111 et seq.

Sec. 128. No Personal Demand of Taxes Shall be Necessary, But it is the duty of every person subject to taxation to attend at the office of the treasurer and pay the first half of the taxes assessed against his property on or before the last day of February and the remaining one half part thereof on or before the last day of July of the year following the one in which they were assessed; and if such person shall neglect or fail to pay such tax until after the first day of August following the levy of the same, the treasurer may make the same, together with all penalties and costs, by distraint and sale of any of his personal property, Whether it be the Property Taxed or Other Property.

Sec. 130. All Taxes Levied or Assessed Upon Personal Property of Any Kind Whatsoever Shall be And Remain a Perpetual Lien Upon the Property so Levied Upon Until the Whole Amount of Such Tax is Paid; and if such property so
68 taxed, or any part thereof, shall have been removed from the county wherein the same was taxed, or the treasurer can not find or obtain the same or other property sufficient for the satisfaction of the tax, with interest, penalties and charges, then the county treasurer shall sue the person so taxed, before some court in his county having jurisdiction; and upon the trial of any such cause the tax roll or a certificate from the county treasurer of the amount of such tax, and that the same is not

paid, shall be Prima Facie evidence that the amount claimed is due and unpaid, and judgment shall be given for the amount of such tax, together with all costs, interest and charges thereon and execution therefor shall issue as in other cases, from which execution and sale there shall be allowed no exemption except such property as is exempt from taxation by this act.

Sec. 131. When the treasurer distrains goods he may keep them at the expense of the owner and shall give notice of the time of their sale within five days after the day of taking, in the manner constables are required to give notice of the sale of personal property on execution; and the time of the sale shall not be more than ten days from the date of the first notice, but he may adjourn the sale from time to time for a period not exceeding ten days, and shall adjourn when there are no bidders; and in case of an adjournment he shall put up a notice thereof at the place of sale. Any surplus remaining above the taxes, penalties, interest and costs, charges for keeping and sale, shall be returned to the owner; and the treasurer shall, on demand, render an account in writing of the sale and charges.

Sec. 133. The officer collecting money by virtue of such distress shall receive the same compensation as is allowed by law to the sheriff of the same county for the execution of a Fieri Facias, to be Collected in addition to the amount due for taxes, interest and penalties, together with ten per cent. of the amount of the tax in addition thereto; and the proceedings in all other respects shall, as nearly as practicable, be the same as pertain to the execution of said writ in other cases.

69 Sec. 134. "The perpetual lien imposed upon personal property in all cases of taxes assessed and levied upon merchandise, created by this chapter, Shall Extend to and Hold any Stock of Merchandise held by the Person or Persons Taxed While Engaged in the Business of Merchandising, Whether Such Stock is the Identical Stock Assessed or Taxed, or Contains Articles Which Have Been Added Thereto After Such Assessment or Levy."

(Over)

Exhibit No. D.

Complt's Proofs,
S. C. Hinsdale,
Examiner.

Denver, Colo., May 11, 1906.

C. W. Badgley, Esq.,
Treas. City & County of Denver,
Denver, Colo.

Dear Sir:

Herewith we hand you $126.50 being taxes and accrued interest for the year 1905 on $3800.—the amount of the valuation of property belonging to the Singer Sewing Machine Company, as per schedule filed by them with the assessor for that year. This does not include the taxes on the amount on which the assessor raised the valuation of the said company over and above the sums stated on the schedule.

Should you refuse to accept this amount in payment of the said taxes on said sum of $3800.—, the Singer Sewing Machine Company hereby tenders the same to you for such purpose and asks you to accept the tender.

Respectfully,
SINGER SEWING MACHINE COMPANY,
J. F. Kelly, Agent.
WCS

70

May 11, 1906.

Tender of $126.50 refused for the reason that the amount tendered does not cover the tax for the year 1905 as certified by the assessor.

C. W. BADGLEY, Treas.,
By Wm. R. Howland, Deputy.

Exhibit No. E.

Tax 1905

Complt's Proofs.
S. C. Hinsdale,
Examiner.

May 28th, 1906.

County Treasurer,
City and County of Denver,
Court House, Denver, Colo.

Dear Sir:

We have received a notice from the County Treasurer of the City and County of Denver, stating that the valuation of the personal property assessed to this company for the year 1905 was $66,300, on which there has been levied a tax of $2154.75. We observe that the valuation named in our schedule was

$3800. From this is appears that the assessor raised the valuation from $3800 to $66,300 and the tax from about $125 to $2154.75.

We are advised by our counsel that the increased assessment was illegal and that we are not legally bound to pay the same. We tendered to you on May 11th, 1906, the sum of $126.50, being the amount of the taxes and accrued interest for the year 1905, on $3800. We are further advised that all taxes assessed against this company in excess of the amount so tendered, are illegal.

Yours very truly,
SINGER SEWING MACHINE COMPANY,
Agent.

(Endorsed) No. 4937. United States Circuit Court, District of Colorado. The Singer Sewing Machine Company, a corporation, vs. Wm. J. Fine, Treas. etc. et al. Complainant's Testimony and Exhibits. Filed Jul. 27, 1909, Charles W. Bishop, Clerk, Sanford C. Hinsdale, Examiner.

71 Forty-Sixth Day, May Term, Tuesday July 27th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

The Singer Sewing Machine Company of New Jersey,
4937. vs. In Chancery.
William J. Fine, Treasurer of the City and County of Denver and The City and County of Denver.

Bill for an Injunction and for other Relief.

This cause comes on now to be heard, R. H. Gilmore, Esquire, appearing as solicitor for the complainant, and Charles R. Brock, Esquire, appearing as solicitor for the respondents;

And thereupon pursuant to a written stipulation thereto herein filed it is ordered by the court that the complainant may amend its bill of complaint herein by interlineation, instanter, which is accordingly done.

The Singer Sewing Machine Company of New Jersey,
4937. vs. In Chancery.
James F. Benedict, Treasurer of the City and County of Denver, and The Board of County Commissioners of the City and County of Denver.

Bill for an Injunction and for other Relief.

This cause comes on now to be heard on final hearing on the bill of complaint, answer, replication, testimony and exhibits taken and filed herein, R. H. Gilmore, Esquire, appearing as

solicitor for the complainant, and Charles R. Brock, Esquire, appearing as solicitor for respondents, is argued by
72 counsel. And thereupon, on consideration thereof, the court finds the equities of this cause to be with the respondents;

It is therefore ordered, adjudged, and decreed by the court that the bill of complaint herein be, and the same is hereby, dismissed out of this court at the costs of the complainant, to be taxed.

It is further ordered by the court that bond on appeal shall be in the sum of five hundred dollars ($500).

In the Circuit Court of the United States in and for the District of Colorado.

The Singer Sewing Machine Company of New Jersey, a corporation, Plaintiff,

No. 4937. vs.

James F. Benedict, Treasurer of the City and County of Denver, and The Board of County Commissioners of the City and County of Denver, Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled action and says, that there is manifest error as shown upon the face of the record in this action in this, to-wit:

1st. The Court erred in entering an order and judgment against the complainant dismissing the complainant's bill of complaint.

2nd. The court erred in not granting to the complainant a writ of injunction restraining the defendants from pro-
73 ceeding to collect the tax levied by the officers of the City and County of Denver against the complainant for the year 1905, as set forth in the said bill.

3rd. The court erred in not granting the prayer of the complainant that a decree be entered by this court, declaring null and void the assessment and tax against the complainant for the year 1905, as to the valuation of $62,500 described in the complaint over and above the $3800 returned by the complainant for taxation.

4th. The court erred in not finding that the situs for taxation of the property upon which the tax was levied against the complainant for the year 1905 was outside of the state of Colorado.

5th. The Court erred in not finding, according to the contention of the complainant, that the tax levied upon the credits of the complainant for the year 1905 was a tax upon interstate commerce.

6th. The court erred in not finding that this action was a case for the exercise of equity jurisdiction on the ground that it appeared that the exercise of such jurisdiction would prevent a multiplicity of suits.

7th. The court erred in not finding that equity jurisdiction of the court should be exercised, because the complainant had no speedy and adequate remedy at law.

8th. The court erred in not finding that the equity jurisdiction of the court should be exercised in this action, be-
74 cause the illegality of the tax described, or the vital defects therein, do not appear upon the face of the record of the county officers, but must be shown by evidence aliunde.

9th. The court erred in entering judgment against the complainant and in favor of the defendants in that the said judgment is contrary to the law of this case, and the facts proven therein.

10th. The court erred in not sustaining the complainant's contention and so finding that the complainant had no speedy or adequate remedy at law.

R. H. GILMORE,
Solicitor for complainant.

Endorsed: No. 4937. In the Circuit Court of the United States in and for the district of Colorado. The Singer Sewing Machine Company of New Jersey, a corporation, Plaintiff, vs. James F. Benedict, Treasurer etc. et al., Defendants. Assignment of Errors. R. H. Gilmore, Atty. for Plaintiff, 706-8 Exchange Bldg., Denver, Colo. Filed Sep. 23, 1909. Charles W. Bishop, Clerk.

The United States of America, District of Colorado.

Know All Men By These Presents, That we, The Singer Sewing Machine Company of New Jersey, and The United States Surety Company of Maryland are held and firmly bound unto The Board of County Commissioners of the City and County of Denver, Colorado, and James F. Benedict, Treasurer of the City and County of Denver, Colorado, in the full and
75 just sum of five hundred dollars, to be paid to the said The Board of County Commissioners of the City & County of Denver and James F. Benedict, Treasurer of the City &

County of Denver, successors, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this twentieth day of September in the year of our Lord one thousand and nine hundred and nine.

Whereas, lately at the May Term, A. D. 1909, of the circuit court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between The Singer Sewing Machine Company, complainant, and The Board of County Commissioners of the City & County of Denver and James F. Benedict, Treasurer of the City & County of Denver, respondents, judgment was rendered against the said The Singer Sewing Machine Company, and the said The Singer Sewing Machine Company having prayed and been allowed an appeal to the United States circuit court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said The Board of County Commissioners of the City & County of Denver, and James F. Benedict, Treasurer of the City & County of Denver, citing and admonishing them to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

76 Now, the condition of the above obligation is such, that if the said The Singer Sewing Machine Company shall prosecute said appeal to effect, and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

(Seal) SINGER SEW MACH. CO.,
(Seal) J. F. Kelly, Agent.

(Seal) THE UNITED SURETY COMPANY,
(Seal) By Hal D. Van Gilder, Agent.

(Corporate seal United)
(Surety Company)

Approved: Robt. E. Lewis,
District Judge.

Sept. 22, 1909.

Endorsed: No. 4937. United States Circuit Court, district of Colorado. The Singer Sewing Machine Co. of New Jersey vs. Board of County Commissioners of City & Co. of

Denver, et al. Bond on Appeal $500.00. Filed Sep. 22, 1909. Charles W. Bishop, Clerk. R. H. Gilmore, Attorney for appellant.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the District of Colorado.

77 The Singer Sewing Mch. Co.
No. 4937. versus.
J. F. Benedict, et al.

The clerk will please prepare a full and complete transcript of record in the above entitled cause for the U. S. C. Circuit Court of Appeals.

R. H. GILMORE,
Attorney for Singer S. M. Co.

To Charles W. Bishop, Clerk,
Denver Colorado, Octo. 7th, 1909.

Endorsed: No. 4937. United States Circuit Court, for the district of Colorado. Singer Sewing Mch. Company versus J. F. Benedict, et al. Praecipe for Transcript on Appeal. Filed Oct. 7, 1909. Charles W. Bishop, Clerk. R. H. Gilmore, Attorney for Sewing M. Co.

78 Citation on Appeal.—U. S. Circuit Court of Appeals.

United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America: To James F. Benedict, Treasurer of the City and County of Denver, and the Board of County Commissioners of the City and County of Denver—Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The Singer Sewing Machine Company of New Jersey is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado and ex officio Judge of the circuit court of the United States for the district of Colorado, at Denver, in said district, this twenty-second day of September, A. D. 1909.

ROBERT E. LEWIS, *Judge.*

Service of this citation is hereby accepted, Oct. 1, 1909.

MILTON SMITH &
CHAS. R. BROCK,
Solicitors for Appellees.

No. 4937. United States Circuit Court of Appeals, Eighth Circuit. The Singer Sewing Machine Company of New Jersey vs. James F. Benedict, Treasurer of the City and County of Denver, et al. Citation. Filed Oct. 21, 1909. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to seventy-seven (77), both inclusive, to be a true, perfect, and complete transcript and copy of the record, testimony, exhibits, assignments of error, bond on appeal, and all proceedings in the case, as directed in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein The Singer Sewing Machine Company of New Jersey was complainant and James F. Benedict, Treasurer of the City and County of Denver, and The Board of County Commissioners of the City and County of Denver, were respondents, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-fifth day of October, A. D. 1909.

[Seal U. S. Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Filed Oct. 30, 1909. John D. Jordan, Clerk.

Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be It Remembered, that on, to-wit, the eighteenth day of January, A. D. 1910, came R. H. Gilmore, Esquire, solicitor for complainant, and filed in said court his petition for appeal in a certain cause in said court pending, wherein The Singer Sewing Machine Company of New Jersey was complainant and James F. Benedict, Treasurer, et al., were respondents.

And the said petition for appeal is in words and figures as follows, to-wit:

In the United States Circuit Court, Eighth District.

No. 4937.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Complainant,
vs.
JAMES F. BENEDICT, Treasurer, et al., Respondents.

Petition for Appeal.

To the Honorable Judges of the Circuit Court of the United States in and for the district of Colorado:

Now comes the Singer Sewing Machine Company by R. H. Gilmore, its solicitor and submits assignments of error in the above entitled action together with an appeal bond in the sum of five hundred dollars ($500.00) as designated by this court and prays an appeal to the Circuit Court of Appeals of the United States, eighth circuit and that an order be made accordingly.

R. H. GILMORE,
Solicitor for Complainant.

Dated January 10, 1909.

Endorsed: U. S. Circuit Court, District of Colorado. The Singer Sewing Machine Company vs. The Board of County Commissioners, etc. et al. Petition for Appeal. Filed Jan. 18, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States in and for the District of Colorado.

No. 4937.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Plaintiff,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, and the Board of County Commissioners of the City and County of Denver, Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled action and says, that there is manifest error as shown upon the face of the record in this action in this, to-wit:

1st. The court erred in entering an order and judgment against the complainant dismissing the complainant's bill of complaint.

2nd. The court erred in not granting to the complainant a writ of injunction restraining the defendants from proceeding to collect the tax levied by the officers of the City and County of Denver against the complainant for the year 1905, as set forth in said bill.

3rd. The court erred in not granting the prayer of the complainant that a decree be entered by this court declaring null and void the assessment and tax against the complainant for the year 1905 as to the valuation of $62,500 described in the complaint over and above the $3800 returned by the complainant for taxation.

4th. The court erred in not finding that the situs for taxation of the property upon which the tax was levied against the complainant for the year 1905 was outside of the state of Colorado.

5th. The court erred in not finding, according to the contention of the complainant, that the tax levied upon the credits of the complainant for the year 1905 was a tax upon interstate commerce.

6th. The court erred in not finding that this action was a case for the exercise of equity jurisdiction on the ground that it appeared that the exercise of such jurisdiction would prevent a multiplicity of suits.

7th. The court erred in not finding that equity jurisdiction of the court should be exercised, because the complainant had no speedy and adequate remedy at law.

8th. The Court erred in not finding that the equity jurisdiction of the court should be exercised in this action, because the illegality of the tax described, or the vital defects therein, do not appear upon the face of the record of the county officers, but must be shown by evidence aliunde.

9th. The court erred in not entering judgment against the complainant and in favor of the defendants in that the said judgment is contrary to the law of this case, and the facts proven therein.

10. The court erred in not sustaining the complainant's contention and so finding that the complainant had no speedy or adequate remedy at law.

R. H. GILMORE,
Solicitor for Complainant.

Endorsed: U. S. Circuit Court, District of Colorado. The Singer Sewing Machine Company, vs. The Board of County Commissioners, etc. et al. Assignment of Errors. Filed Jan. 18, 1910. Charles W. Bishop, Clerk.

Forty-ninth Day, November Term, Tuesday, January 18th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and the Honorable Jacob Trieber, Judge of the district court of the United States for the eastern district of Arkansas, assigned to hold the circuit court of the United States for the district of Colorado, and other officers as noted on the second day of November, A. D. 1909.

And Before the Honorable Robert E. Lewis, District Judge, the following proceedings were had:

4937. In Chancery.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al.

Bill for an Injunction and for Other Relief.

This cause comes on now to be heard, R. H. Gilmore, Esquire, appearing as solicitor for the complainant;

And thereupon, the complainant prays an appeal to the United States circuit court of appeals for the eighth circuit, which is hereby allowed to it, and bond on such appeal shall be in the sum of five hundred dollars ($500).

THE UNITED STATES OF AMERICA,
District of Colorado:

Know All Men By These Presents, That we, The Singer Sewing Machine Company of New Jersey and The United States Surety Company of Maryland are held and firmly bound unto The Board of County Commissioners of the City and County of Denver, Colorado, and James F. Benedict, Treasurer of the City and County of Denver, Colorado, in the full and just sum of five hundred dollars, to be paid to the said The Board of County Commissioners of the City and County of Denver and James F. Benedict, Treasurer of the City and County of Denver, successors, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twentieth day of September in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at the May term, A. D. 1909, of the circuit court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between The Singer Sewing Machine Company, complainant, and The Board of County Commissioners of the City & County of Denver and James F. Benedict, Treasurer of the City and County of Denver, respondent, judgment was rendered against the said The Singer Sewing Machine Company and the said The Singer Sewing Machine Company having prayed and been allowed an appeal to the United States circuit court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit; and a citation directed to the said The Board of County Commissioners of the City & County of Denver and James F. Benedict, Treasurer of the City & County of Denver citing and admonishing * * * to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Singer Sewing Machine Company shall prosecute said ap-

peal to effect, and answer all damages and costs, if — fail to make good — plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

THE SINGER SEWING MACH. CO., [SEAL.]
By J. F. KELLY, *Agent.* [SEAL.]
UNITED SURETY COMPANY, [SEAL.]
By HAL D. VAN GILDER, *Agent.* [SEAL.]

[Corporate Seal United Surety Company.]

Approved,
ROB'T E. LEWIS,
District Judge.

Endorsed: No. 4937. United States Circuit Court, District of Colorado. The Singer Sewing Machine Company vs. The Board of County Commissioners of the City & County of Denver, et al. Bond on Appeal. $500.00. Filed Jan. 18, 1910. Charles W. Bishop, Clerk. R. H. Gilmore, Attorney for Appellant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of petition for appeal, assignment of errors, bond on appeal and one order of court, filed and entered of record in said court and in a certain cause lately in said court pending wherein The Singer Sewing Machine Company of New Jersey was complainant and James F. Benedict, Treasurer, et al. were respondents, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver in said district, this eighteenth day of January, A. D. 1910.

[Seal U. S. Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk,*
By ALBERT TREGO, *Deputy Clerk.*

No. 3328. The Singer Sewing Machine Company of New Jersey, Appellant, vs. James F. Benedict, Treas. &c. et al. Transcript of Record on Second Appeal. Filed Jan. 27, 1910. John D. Jordan, Clerk.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to James F. Benedict, Treasurer of the City and County of Denver, a Municipal Corporation, and The Board of County Commissioners of the City and County of Denver, Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The Singer Sewing Machine Company of New Jersey, [—] appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado and ex officio Judge of the circuit court of the United States for the district of Colorado, at Denver, in said district, this twenty-eighth day of January, A. D. 1910.

ROB'T E. LEWIS, *Judge.*

Proof of Service.

DENVER, *Jan'y* 28, 1910.

Service of the within Citation accepted at Denver Colorado this 28th day of January A. D. 1910, and copy thereof received.

MILTON SMITH &
CHAS. R. BROCK,
Attorneys for Appellees.

No. 3328. United States Circuit Court of Appeals, Eighth Circuit. The Singer Sewing Machine Company of New Jersey Appellant, vs. James F. Benedict, Treasurer, etc. et al. Citation. Filed Jan. 31, 1910. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant in Cause No.* 3166.)

On the twenty-seventh day of September, A. D. 1909, the appearance of counsel for appellant was filed in cause No. 3166. in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, etc., Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. H. GILMORE,
706-8 *Exchange Bldg., Denver, Colo.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3166. The Singer Sewing Machine Company of New Jersey, etc., Appellant, vs. James F. Benedict, Treasurer, etc., et al. Appearance. Filed Sep. 27, 1909. John D. Jordan, Clerk. R. H. Gilmore, Counsel for Appellant.

(*Appearance of Counsel for Appellee Benedict, as Treasurer, etc., in Cause No.* 3166.)

And on the twenty-seventh day of September, A. D. 1909, the appearance of counsel for appellee, Benedict, as Treasurer, etc., was filed in cause No. 3166, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3166.

THE SINGER SEWING MACHINE COMPANY, Appellant,
vs.
JAMES F. BENEDICT, as Treasurer of the City and County of Denver.

The Clerk will enter our appearance as Counsel for the Appellee.

MILTON SMITH,
CHAS. R. BROCK,
824 *Equitable Bldg., Denver, Colo.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3166. The Singer Sewing Machine Company vs. James R. Benedict, as Treasurer of the City & County of Denver. Appearance. Filed Sep. 27, 1909. John D. Jordan, Clerk. Milton Smith, Chas. R. Brock, Counsel for Appellee.

(*Motion to Dismiss Appeal and Notice Thereof.*)

And on the twelfth day of January, A. D. 1910, a motion by appellees to dismiss the appeal, with notice thereof, was filed in cause No. 3166, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
Appellant,
v.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al., Appellees.

Motion to Dismiss Appeal.

Comes now the appellees in the above-entitled suit, by their attorneys, and move the court to dismiss the appeal herein, and for ground of said motion allege:

That no assignment of errors was filed with or prior to the application for appeal, and no assignment of errors with prayer for a reversal has ever at any time been filed.

MILTON SMITH,
CHAS. R. BROCK,
Solicitors for Appellees.

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
Appellant,
v.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al., Appellees.

Notice.

To the appellant in the above-entitled suit and R. H. Gilmore, its solicitor:

You are hereby notified that upon the calling of the above-entitled suit for oral argument the appellees will enter a motion to dismiss the appeal, a copy of which motion is herewith served.

MILTON SMITH,
CHAS. R. BROCK,
Solicitors for Appellees.

Received a copy of the foregoing notice, together with a copy of the motion therein mentioned, this January 19th, A. D. 1910.

R. H. GILMORE,
Solicitor for Appellant.

(Endorsed:) In the United States Circuit Court of Appeals, Eighth Circuit. No. 3166. The Singer Sewing Machine Company of New Jersey, Appellant, v. James F. Benedict, Treasurer of the City and County of Denver, et al., Appellees. Motion to Dismiss Appeal and Notice thereof. Filed Jan. 12, 1910. John D. Jordan, Clerk. Milton Smith, Chas. R. Brock, Solicitors for Appellees.

(*Objections of Appellant to Motion to Dismiss Appeal in Cause No.* 3166.)

And on the seventeenth day of January, A. D. 1910, objections by the Appellant to motion to dismiss were filed in cause No. 3166, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,

vs.

JAMES F. BENEDICT, Treasurer, et al., Appellees.

Objections to Dismissal.

Now comes the Appellant, by R. H. Gilmore its attorney, and objects to the motion of the Appellees to dismiss this appeal for the following reasons, to-wit:

First. The Appellees by entering into stipulation on the 27th of September, 1909, that this appeal be set down for hearing on the merits at the December term of this Court, have waived their right to move for said dismissal as will more fully appear from the copy of said stipulation hereto attached and made a part hereof. That the said stipulation was filed in this Court at said date, and has since hitherto remained on file as part of the records of this case and the said appeal has accordingly been set down for hearing at this term.

Second. If the Court should decide that the Appellees have not waived the right to make this motion to dismiss then the Appellant moves that an order be entered that the appeal bond now on file be re-filed as of date September 23rd, 1909, nunc pro tunc, or

Third. The Appellant has prepared a new bond which is an exact copy of the bond already on file, and the same has been executed by the Appellant and by the same Surety Company, which signed the other bond as Surety and the same is now on deposit

with the Clerk of the Circuit Court of the United States at Denver, Colorado, with the understanding entered into, with the Hon. Robert E. Lewis, U. S. Judge of District Court & Circuit Court, that he will approve the bond and grant the appeal upon receiving telegram from the Appellant's attorney that this Court prefers that a new bond be filed, a copy of the petition for allowance of the appeal and a copy of the said bond, and of the said assignments of errors, the same as now on deposit with the Clerk of the said Circuit Court, is hereto attached. That a copy of the said stipulation and the said petition, and the said new bond, and the said assignments of error, are hereto attached, and marked respectively, Exhibit- A. B. C. and D. to which reference is had.

R. H. GILMORE,
Solicitor for Appellant.

Dated January 14, 1910.

EXHIBIT "A."

In the United States Circuit Court of Appeals, Eighth District.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,
vs.
JAMES F. BENEDICT, Treasurer, et al., Appellees.

Stipulation.

The parties in the above entitled action, being desirous that the merits of the questions involved therein, should be determined by the Court as soon as possible, it is hereby stipulated and agreed that the said cause now pending on appeal herein, may be set down for hearing at the December Term, A. D. 1909, of this Court, at St. Louis, Missouri.

R. H. GILMORE,
Solicitor for Appellant.
MILTON SMITH &
CHAS. R. BROCK,
Solicitors for Appellees.

Dated September 27, 1909.

EXHIBIT "B."

Bond on Appeal.

THE UNITED STATES OF AMERICA,
District of Colorado:

Know All Men By These Presents, That we, The Singer Sewing Machine Company of New Jersey, and the United Surety Company

of Maryland are held and firmly bound unto The Board of County Commissioners of the City and County of Denver, Colorado, and James F. Benedict, Treasurer of the City and County of Denver, Colorado, in the full and just sum of Five Hundred Dollars, to be paid to the said Board of County Commissioners of the City and County of Denver, and James F. Benedict, Treasurer of the City and County of Denver, Successors executors, administrators or assigns, to which payment will and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twentieth day of September in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at the May term, A. D. 1909, of the circuit court of the United States, for the district of Colorado, sitting at Denver, in a suit pending in said court between The Singer Sewing Machine Company Complainant, and the Board of County Commissioners of the City and County of Denver and James F. Benedict, Treasurer of the City and County of Denver Respondent-, judgment was rendered against the said The Singer Sewing Machine Company and the said The Singer Sewing Machine Company having prayed and been allowed an appeal to the United States circuit court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit; and a citation directed to the said The Board of County Commissioners of the City and County of Denver and James F. Benedict, Treasurer of the City and County of Denver citing and admonishing — to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Singer Sewing Machine Company shall prosecute said appeal to effect, and answer all damages and costs, if — fail to make good — plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

THE SINGER SEWING MACHINE COMPANY, [SEAL.]
By J. F. KELLY, *Agent.* [SEAL.]
UNITED SURETY COMPANY, [SEAL.]
By HAL D. VAN GILDER, *Agent.* [SEAL.]

[CORPORATE SEAL.]

Approved —.
—— ——, *Judge.*

(Endorsed:) No. —. United States Circuit Court, District of Colorado. —— vs. ——. Bond on Appeal. $—. —— ——, Attorney for Appellant.

EXHIBIT "C."

No. 4937.

In the United States Circuit Court, Eighth District.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Complainant,
vs.
JAMES F. BENEDICT, Treasurer, et al., Respondents.

Petition for Appeal.

To the Honorable Judges of the Circuit Court of the United States in and for the District of Colorado:

Now comes the Singer Sewing Machine Company by R. H. Gilmore, its solicitor and submits assignments of error in the above entitled action together with an appeal bond in the sum of five hundred dollars ($500.00) as designated by this Court and prays an appeal to the Circuit Court of Appeals of the United States, eighth Circuit and that an order be made accordingly.

R. H. GILMORE,
Solicitor for Complainant.

Dated January 10, 1909.

EXHIBIT "D."

In the Circuit Court of the United States in and for the District of Colorado.

No. 4937.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Plaintiff,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, and the Board of County Commissioners of the City and County of Denver, Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled action and says, that there is manifest error as shown upon the face of the record in this action in this, to-wit:

1st. The Court erred in entering an order and judgment against the complainant dismissing the complainant's Bill of Complaint.

2nd. The Court erred in not granting to the complainant a Writ of Injunction restraining the defendants from proceeding to collect the tax levied by the officers of the City and County of Denver against the complainant for the year 1905, as set forth in the said Bill.

3rd. The Court erred in not granting the prayer of the complainant that a decree be entered by this Court declaring null and void the assessment and tax against the complainant for the year 1905 as to the valuation of $62,500 described in the Complaint over and above the $3800 returned by the complainant for taxation.

4th. The Court erred in not finding that the situs for taxation of the property upon which the tax was levied against the complainant for the year 1905 was outside of the State of Colorado.

5th. The Court erred in not finding, according to the contention of the complainant, that the tax levied upon the credits of the complainant for the year 1905 was a tax upon interstate commerce.

6th. The Court erred in not finding that this action was a case for the exercise of equity jurisdiction on the ground that it appeared that the exercise of such jurisdiction would prevent a multiplicity of suits.

7th. The Court erred in not finding that equity jurisdiction of the Court should be exercised, because the complainant had no speedy and adequate remedy at law.

8th. The Court erred in not finding that the equity jurisdiction of the Court should be exercised in this action, because the illegality of the tax described, or the vital defects therein, do not appear upon the face of the record of the county officers, but must be shown by evidence *aliunde*.

9th. The Court erred in not entering judgment against the complainant and in favor of the defendants in that the said judgment is contrary to the law of this case, and the facts proven therein.

10th. The Court erred in not sustaining the complainant's contention and so finding that the complainant had no speedy or adequate remedy at law.

R. H. GILMORE,
Solicitor for Complainant.

(Endorsed:) No. 3166. U. S. Circuit Court of Appeals. The Singer Sewing Machine Company v. James F. Benedict, Treasurer &c., et al. Objections to Dismissal. Filed Jan. 17, 1910, John D. Jordan, Clerk. R. H. Gilmore, Att'y for Appellant.

(*Argument Commenced in Cause No.* 3166.)

And on the seventeenth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an entry in cause No. 3166, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

MONDAY, *January* 17, 1910.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. R. H. Gilmore in behalf of the appellant and continued by Mr. Charles R. Brock for the appellees but the hour for adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until to-morrow.

(*Order of Submission in Cause No.* 3166.)

And on the eighteenth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 3166, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

TUESDAY, *January* 18, 1910.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

This cause having been called this day for further hearing, argument was continued by Mr. Charles R. Brock for the appellees and concluded by Mr. R. H. Gilmore for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Order Dismissing Appeal in Cause No.* 3166 *and Transferring Proceedings, etc., to Cause No.* 3328.)

And on the twenty-seventh day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order dismissing the appeal in cause No. 3166 and transferring proceedings etc., to cause No. 3328, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

THURSDAY, *January* 27, 1910.

No. 3166.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,

vs.

JAMES F. BENEDICT, Treasurer of the City and County of Denver, etc., et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard upon the motion of counsel for Appellees to dismiss the appeal herein heretofore argued and submitted to the Court.

On Consideration Whereof, it is now here ordered by this Court, that said motion be, and *and* the same is hereby, granted; and that the appeal in this cause be, and the same is hereby, dismissed.

And it appearing that appellant has perfected an appeal from the decree of the Circuit Court within the time limited by law and has duly filed and docketed the same in this Court as cause No. 3328, it is now here further ordered by this Court that the transcript of the record, the printed copies thereof, the briefs of counsel filed herein and all proceedings of record in this cause in this Court, including the costs in this Court, shall be transferred to and be deemed and taken to stand as and for the proceedings in cause No. 3328 so far as the same may be lawfully done, and the cause shall proceed and be determined in this Court as cause No. 3328, with the same force and effect as if all the proceedings aforesaid had been had and done in cause No. 3328.

January 27, 1910.

(*Appearance of Counsel for Appellees in Cause No.* 3328.)

On the twenty-first day of February, A. D. 1910, the appearance of counsel for appellees was filed in cause No. 3328, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3328.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,
vs.
JAMES F. BENEDICT, Treasurer, etc., et al.

The Clerk will enter my appearance as Counsel for the Appellees.
MILTON SMITH,
CHAS. R. BROCK,
824 *Equitable Bldg., Denver, Colorado.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3328. The Singer Sewing Machine Company of New Jersey, Appellant, vs. James F. Benedict, Treas., etc., et al. Appearance. Filed Feb. 21, 1910. John D. Jordan, Clerk. Milton Smith, Charles R. Brock, Counsel for Appellees.

(*Appearance of Counsel for Appellant in Cause No.* 3328.)

And on the fourth day of March, A. D. 1910, the appearance of counsel for appellant was filed in cause No. 3328, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3328.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,
vs.
JAMES F. BENEDICT, Treasurer, etc., et al.

The Clerk will enter my appearance as Counsel for the Appellants.
R. H. GILMORE,
Denver, Colo.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3328. The Singer Sewing Machine Company of New Jersey, Appellant, vs. James F. Benedict, Treasurer, etc., et al. Appearance. Filed Mar. 4, 1910. John D. Jordan, Clerk. R. H. Gilmore, Counsel for Appellant.

(*Opinion.*)

And on the twenty-seventh day of April, A. D. 1910, the opinion of said United States Circuit Court of Appeals was filed in cause No. 3328, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3328.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, et al., Appellees.

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. R. H. Gilmore for appellant.
Mr. Charles R. Brock (Mr. Milton Smith was with him on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge, delivered the opinion of the court.

The Singer Sewing Machine Company, a foreign corporation, made a return of taxable personal property for the year 1905 to the assessor of the City and County of Denver disclosing a value of $3800.00. The assessor increased that amount, adding $62,500.00 more in value of personal property. A tax list or warrant authorizing the collection of taxes from the Company on the total amount of $66,300.00 was afterwards made out and delivered to the City and County treasurer whose duty it became to collect the taxes assessed thereon. Afterwards the Company tendered to the treasurer $136.30, the amount of taxes with accrued interest due on $3800.00 worth of property as returned by it for taxation, and refused to pay the taxes assessed against the increase of $62,500.00 on the ground that they were unlawfully imposed and illegal. This was a suit to enjoin the treasurer from proceeding to collect this additional tax, which, it was alleged, he threatened to do.

The real controversy was whether certain moneys, notes and contracts, which in the regular course of business of the Company were temporarily detained at its local office in Denver on their way to their ultimate destination, the home office of the complainant, were taxable in Denver. It was on an average value of these that the assessor based the increase in valuation made by him.

Complainant stated in its bill as reasons for invoking the aid of a court of equity that no notice of an increase in its taxable property was given to the Company; that it was thereby deprived of an opportunity to make application to the assessor for redress or appeal to the District or County court for a review of the assessor's action as provided by Secs. 5639 and 5640 of the Revised Statutes of Colorado and that it had no adequate remedy at law against the collection of the tax assessed on the increase.

There are no averments in the bill showing any fraud, accident or mistake which conduced to the over-valuation, any cloud upon title to real estate, or danger of multiplicity of suits, or any averments planting complainant's right to relief upon any other head of equity jurisdiction excepting inadequacy of legal remedy.

We are met at the threshold with the objection that the present bill cannot be sustained because it presents no cause of equitable cognizance but rather one for which the law courts afford an adequate remedy.

Complainant endeavors to forestall a consideration of this objection on the ground that defendant answered and went to trial on the merits. For that reason it is urged it is now too late to object to the jurisdiction in equity over the subject-matter. The following authorities are cited and relied upon by the complainant's counsel: 1 Daniell's Chancery Pleading & Practice, Fifth Ed., pp. 555 and 600 et seq.; Wylie v. Coxe, 15 How. 415, 420; New Orleans v. Morris, 105 U. S. 600; Reynes v. Dumont 130 U. S. 354, 395; Brown v. Lake Superior Iron Co., 134 U. S. 530.

An examination of these and other cases discloses that the rule invoked prevails only when the objection is made for the first time in the appellate court. In the present case jurisdiction in equity was challenged *in limine* by a demurrer on the specific ground that the bill contained no matter of equity and upon that being overruled the same objection was again taken by answer. Until the final decree was passed no appeal lay and the question of jurisdiction over the subject-matter could not before then have been reviewed. Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961, 964. In such cases an appeal after final decree presents for review the entire record and if for any reason the decree below was right it will be affirmed.

The objection to our consideration of the jurisdictional question is untenable.

Does the bill disclose a right to the injunctive relief sought? In other words does it disclose that complainant did not have an adequate remedy at law? These are questions which if answered in favor of defendant render consideration of the merits of the case unnecessary.

The law is well settled that unless a complainant can invoke some recognized head of equity jurisdiction the mere illegality or irregularity of a tax complained of, gives no right to injunctive relief against its collection. Hannewinkle v. Georgetown, 15 Wall. 547; State Railroad Tax Cases, 92 U. S. 575; Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516; Milwaukee v. Koeffler, 116 U. S. 219; Pittsburgh &c. Ry. Co. v. Board of Pub. Works, 172 U. S. 33;

Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350, 357; Hallett v. Arapahoe County, 40 Colo. 308.

In the Hannewinkle case (supra) which was a bill to enjoin the collection of a tax claimed to be illegal, the Supreme Court, speaking by Mr. Justice Hunt, said: "It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In State Railroad Tax Cases (supra) Mr. Justice Miller, speaking for the court, after quoting from the Hannewinkle case, said: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction."

In Indiana Mfg. Co. v. Koehne (supra) Mr. Justice Peckham, speaking for the court, made these observations: "It has long been the settled doctrine of the Federal Courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary process of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."

From the analysis already made of the bill it appears that it is not grounded upon an equitable foundation like fraud, mistake, avoidance of multiplicity of suits, removing cloud from title to real estate or any like matter. It rests practically upon the propositions that the tax was illegal and that complainant had no adequate remedy at law to prevent its collection. The claim to equitable relief is stated in the bill in the following words: "And the plaintiff further says that by reason of the neglect and omission of the County assessor to notify the plaintiff, as provided by the said Revenue Act that he had changed the valuation of the plaintiff's personal property as fixed by the plaintiff in its tax schedule from $3800.00 to $66,300.00 and of the other matters and things hereinbefore alleged, that the plaintiff is deprived of any remedy at law to redress the wrong imposed upon the plaintiff in this case; that by reason whereof the plaintiff has no speedy and adequate remedy at law, and the threatened proceeding of the defendant, if executed, would work an irreparable injury to the plaintiff, unless restrained by the order of this court, and the plaintiff is compelled to invoke the protection of a court of equity to prevent such threatened injury."

It is said the assessment of complainant's property by the assessor, at a valuation above that returned by it, was an adjudication of the legality of the tax and unassailable except by some direct proceeding like the present bill.

We may concede all that is claimed to follow from a failure to give the notice prescribed by Secs. 5639 and 5640, R. S. 1908; that the notice was a prerequisite to the exercise of jurisdiction to tax the increase made by the assessor. He and other officers acting with him in extending the tax on that increase and issuing the warrant for its collection acted as a special judicial tribunal, and if their judgment was within their jurisdiction it is not subject to collateral attack; but if without their jurisdiction it is subject to such attack. Stanley v. Board of Supervisors, 121 U. S. 535, 550; McLeod v. Receveur, 18 C. C. A. 188, 71 Fed. 455, 458. Like all judgments in personam whether of special tribunals or courts of general jurisdiction in which there is an absence of service of process or notice or appearance requisite to confer jurisdiction, the assessment in this case was simply void and may be attacked collaterally whenever any claim of right is asserted under it. Pennoyer v. Neff, 95 U. S. 714, and cases cited.

This leaves the sole remaining inquiry whether the bill and proof disclose that in other respects the complainant had no adequate remedy at law for the wrong and injury alleged to have been threatened by the defendant.

The Statute of Colorado (Sec. 5750 R. S. 1908; Sec. 202, Revenue Act, Approved March 22, 1907; Session Laws Colo. 1902, p. 46) providing that the Board of County Commissioners shall refund to the tax payer any erroneous or illegal taxes which he may have been compelled to pay has been held by this court (Atchison, T. & S. F. Ry. Co. v. Sullivan, — C. C. A., —, 173 Fed. 456, 470) not to afford an adequate remedy to a tax payer who has been required to pay an illegal tax and we, therefore, omit further consideration of that Statute as a basis for legal relief.

Secs. 5682 and 5768 id. (Secs. 135 and 220 of the Revenue Act, 1902, as amended by the act of April 11, 1903, Session Laws Colo., 1903, p. 407) empower the treasurer in certain circumstances to enforce collection of taxes upon personal property by distraint and sale of any personal property of the debtor.

But there is neither charge nor proof that complainant had any personal property of any kind in the City or County of Denver at the time this suit was brought, and there are no allegations or proof that complainant would be injured or embarrassed by any distraint or sale of its personal property or that any such action was threatened by the defendant. The only threat proved at the hearing was contained in a letter of date October 1, 1906, three weeks before this suit was brought, written by the treasurer to complainant, as follows: "Denver, Colo., Oct. 1, 1906. Singer Sewing Machine Co. Your personal tax for the year 1905, amounting to $2284.05, is delinquent, and unless paid at once I will be obliged to enforce collection of same according to law. If you compel this course the expense will greatly exceed the amount now demanded. Your attention is directed to the charges and penalties prescribed by law, and printed on the back of this notice, to which you will be subject if it becomes necessary to enforce a collection of your unpaid personal taxes."

Accordingly, we may eliminate any threatened distraint of personal property as a ground upon which injunctive relief is predicated. Even if we could not do so we do not think the threat to seize personal property for the satisfaction of an illegal tax would by itself entitle the owner to an injunction in equity. It would amount to a trespass for which the injured party could have proper redress in an action at law.

The only other method of collecting the tax in question was by an ordinary suit by the treasurer against the delinquent tax payer. This was a method provided by Sec. 6677 id. (Session Laws of 1902, p. 112) in case the treasurer could not find the property upon which the tax had been levied or any other property sufficient for the satisfaction of the tax, interest and penalties. If such a suit had been threatened and instituted complainant would have had an adequate remedy at law to make any defense based upon the illegality of the tax; and this could have been made either in the State court where the action might have been brought or in the Federal court by the process of removal if desired by the defendant in the action. We have held that when one has a right to resort to the Federal court for the redress of an injury the fact that he may have a remedy at law in a State court is not an adequate remedy within the meaning of the equitable rule under consideration. National Surety Co. v. State Bank, 56 C. C. A. 657, 120 Fed. 593, 602, and cases cited.

Giving the complainant the benefit of that rule we are of opinion that whatever action may have been contemplated in the so called threatening letter of the treasurer, the complainant would have had a complete and adequate remedy at law so far as this record discloses for any injury it might have sustained if the threat had been actually put into execution.

Learned counsel for complainant urges that this court in Atchison, T. & S. F. Ry. Co. v. Sullivan (supra) made pronouncements which justify his present contention. We, however, do not think so. That was a case for injunctive relief against unjust, systematic and intentional discrimination in the valuation of the property of the Railway Company for the purpose of subjecting it to an undue proportion of the public burden. We were there met with the objection to equitable relief now made by the defendants in this case. That was disposed of by the court, Sanborn, Circuit Judge, speaking for it, in the following language: "Finally, counsel for the defendant invoke the conceded rule that some recognized ground of equity jurisdiction, and the fact that the complainant has no adequate remedy at law, in addition to the fact that the tax is excessive and illegal, are essential to the maintenance of a suit in equity for injunctive relief, and they insist that no such foundation for this suit has been laid by the proof." * * * "Fraud and mistake are ancient heads of equity jurisdiction. The Board of Equalization made a plain mistake, demonstrable by the mere division of their assessment of the corporate plant of the Company in the State by the number of miles of railroad they found the Company controlled therein, when it certified to the

County of Bent its over-assessment of the Company's property in that County. The systematic and intentional omission of watches, clocks, and jewelry, credits and fat stock by the County assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law."

The conclusion cannot be avoided that in that case the rule already laid down in this case that actions of this kind must be grounded upon some recognized head of equity jurisdiction in addition to the mere fact of illegality or erroneousness in the tax sought to be collected, was fully recognized and acted upon. The learned judge said the rule here laid down was a "conceded one" and proceeded to demonstrate that the action in that case was founded upon one of the best recognized grounds of equity jurisdiction, namely, actual mistake or intentional fraud.

We have no occasion or disposition to criticize the doctrine of that case; but it has no application to the pleadings or facts of this case.

The burden rested on complainant to aver and if necessary to prove facts showing that it had no adequate remedy at law for the wrong threatened to be perpetrated against it.

After a careful consideration of the pleadings and proof we are satisfied that it has failed in this respect. The decree of the Circuit Court dismissing the bill must, therefore, be Affirmed.

Filed April 27, 1910.

SANBORN, *Circuit Judge*, dissenting:

Propositions of law and fact assumed by the majority and conceded to be sound which condition the decision of this case are these: The mere excess or illegality of a tax will not sustain a bill in equity to avoid it or to restrain its collection in the absence of any ground of equity jurisdiction such as fraud, accident, mistake or threatened multiplicity of suits and of inadequacy of the remedy at law. One may not be deprived of his property without due process of law by the levy and collection of an illegal tax any more constitutionally than he may by any other proceeding without such process. The due process of law prescribed by the statutes of Colorado, by which the assessment or valuation of the complainant's property, that formed the foundation of the tax here in question, was to be fixed and adjudicated, was that the complainant should make and deliver to the assessor a schedule of its taxable property and of its value under oath, Revised Statutes Colorado, 1902, Secs. 5573, 5582, 5615, that "the assessor shall, prior to the first Tuesday in August of each year, mail to each person, association or corporation, whose property has been assessed at a valuation other than that given in the schedule filed by such person, association or corporation, a statement of any such change in valuation, and shall give notice by publication * * * that on the day to be therein named he will sit to hear any and all objec-

tions to the assessment roll," that he should hear such objections on that and succeeding days until all grievances were heard, Section 5639, that from any decision of the assessor overruling any of its objections to the increase of its assessment the complainant might appeal to the Board of County Commissioners which might hear all testimony produced and subpœna witnesses to testify and that from an adverse decision of the Board the complainant might appeal to the District Court where the issue should be tried de novo on its merits. Section 5641. The complainant filed its verified schedule according to the law in which it stated that the assessment or valuation of its taxable property was $3800.00. The assessor arbitrarily and without good reason raised this assessment to $66,300.00, but gave the complainant no notice of, and it did not know, that fact so that it had no opportunity to contest this raise before the assessor, before the Board of County Commissioners or before the District Court. Upon this increased assessment, which was confirmed and sent forward by the assessor without notice, the tax in question has been levied and it is a perpetual lien on all the personal property upon which it was laid. Section 5676.

The majority are of the opinion that the rational deduction from these assumed or conceded propositions of law and fact is that there is no equity in the bill, while it seems to me that they present good ground for the relief sought by the complainant.

Under the statutes of Colorado, which have been quoted, the assessment roll after the time for a hearing upon the increased assessment passed and after the roll was confirmed and sent forward by the assessor for the levy, was an adjudication of the assessment of the complainant' property by the quasi judicial tribunal, the assessor, the Board of County Commissioners or the District Court, empowered by the law to determine its amount.

Does this case present any ground of equitable cognizance? Due process of law is as essential to the taking of one's property by taxation as by a judgment of the court, or by any other proceeding, and due process of law must give "notice to the defendant of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought from the court if the claim is sustained." In re Wood and Henderson, 210 U. S. 246, 254; In re Rosser, 41 C. C. A. 497, 501, 101 Fed. 562, 566. In the Colorado scheme of taxation the notice of the increase of the assessment required by Section 5639, was the process upon which the whole proceeding was founded. It was the summons to the complainant to appear before the assessor, before the Board of County Commissioners and before the District Court if it desired and to answer the claim of the County that its taxable property was $62,500.00 more than it had testified that it was. But this summons was never served, this notice was never given to the complainant and a judgment by default was rendered against it that its assessment was $62,500.00 more than it actually was and that it should pay an unconscionable tax upon this illegal increase. Why was this notice not given? If the assessor intentionally withheld it and knowingly confirmed and sent forward the assessment without giving the notice, he perpetrated a

gross fraud upon the complainant. If he did not knowingly or intentionally withhold the notice or fail to give it, he did so by mistake or accident. In either case he brought this suit well within the domain of a court of chancery. Fraud, accident and mistake are three great heads of equity jurisprudence, and whenever injustice or wrong, irremediable at law is about to result from either, the power is vested in and the duty is imposed upon the courts of equity to prevent the threatened injury. Their jurisdiction rests upon the fact that, unless they act, wrong will be perpetrated which cannot be remedied. The facts of this case seem to me to bring it within these established principles.

Has the complainant a remedy at law in the national courts against the unjust tax as prompt, complete and efficacious as the remedy by injunction which it seeks? For it is such a remedy in such a court and that alone that may repel it from a federal court of equity. It is conceded on all hands that the assessment roll and the warrant issued thereon are presumptive proof within and without every court of service of the jurisdictional notice, of the validity of the tax and of the regularity of all prior proceedings. Are they not also conclusive evidence thereof against every attack not supported by averments and proof of fraud, mistake or some other such equitable ground of relief? And such allegations and proof for the purpose of avoiding such adjudications and enjoining their execution may be heard in the federal courts in suits in equity alone.

It is true that judgments of courts and of quasi judicial tribunals, such as the assessor and the Board of Equalization, are alike open to collateral attack where the subject matters of the persons thereof cannot be subject to the jurisdiction of such tribunals. Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 320; In re Sawyer, 124 U. S. 200, 221, 222; Whitehead v. Railroad Company, 28 Ark. 460; Lessee of Hickey v. Stewart, 3 How. 751; Bigelow v. Forrest, 9 Wall. 339, 351; Ex parte Lange, 18 Wall. 163, 176. But where, as in the case at bar, the subject matter and the party are within the potential jurisdiction of the tribunal, in this case the assessor, and its jurisdiction depends upon a fact which might or might not support that jurisdiction, in this case the fact of service of the jurisdictional notice, which the tribunal is empowered and required to ascertain and determine, its decision is conclusive against collateral attack and it can be avoided only by a direct appeal or a plenary suit for fraud, mistake or some other equitable ground of relief. Colton v. Beardsley, 38 Barb. (N. Y.) 29, 51, 52, and cases there cited; In re Sawyer, 124 U. S. 200, 220, 221; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 556, 559; Rogers v. Penobscot Mining Co., 154 Fed. 606, 609; Foltz v. St. Louis & S. F. Ry. Co., 8 C. C. A. 635, 637, 60 Fed. 316, 318; National Surety Co. v. State Bank, 120 Fed. 593, 600.

The difference between these two classes of cases is noted in Rogers v. Penobscot Mining Company, where it is said that a challenge of the power of the court to take any action in the case under any circumstances is fundamental and subject to examination without

a specification of error, while an objection that the jurisdictional notice was not served assails nothing but the method of the exercise of the power of the court, relates to procedure only and cannot be successfully presented indirectly. Pennoyer v. Neff, 95 U. S. 714, 721, 722, cited by the majority, well illustrates the distinction. In that case an indirect attack was made upon a judgment against a person without the jurisdiction of the court which rendered the judgment which was based on the publication of the summons. The fact that the defendant had not been personally served within the territorial jurisdiction of the court was admitted and the judgment was assailed (1) because the affidavit for publication was insufficient to invoke the jurisdiction of the court and (2) because the court was without any power to acquire jurisdiction of the person of the defendant beyond its territorial jurisdiction. The Supreme Court decided that advantage of the lack of jurisdiction on the former ground could be taken by a direct attack only, but that on the second ground the judgment was void against a collateral attack.

In Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 556, 559, a lack of a diversity of citizenship requisite to give jurisdiction to the Circuit Court which rendered the judgment apparent on the face of the record, and In re Sawyer, 124 U. S. 220, 221, a lack of the requisite amount in controversy to give jurisdiction apparent on the record, were declared to be unavailable to avoid the judgments on collateral attacks.

In Colton v. Beardsley, 38 Barb. 29, 51, 52, the jurisdiction of a school district to elect a trustee was conditioned by the existence of a vacancy and that fact was primarily determinable by the remaining trustees. They had decided that there was a vacancy and had called the election. The New York court said: "It is of the essence and nature of such acts, whether the power to perform them is committed to a court or a body of men, or to an individual, that they are final and conclusive except in a direct proceeding for their reversal; and that they can not be inquired into or questioned collaterally. When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. * * * The test of jurisdiction in such cases is, whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong."

In Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. at page 319, this court declared: "Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud." And in National Surety Co. v. State Bank, 120 Fed. 593, we sustained a bill in equity to enjoin the enforcement of a judgment of a state court on the ground that by mistake the jurisdictional notice had not been served upon the defendant.

The assessor had jurisdiction upon proper notice to the com-

plainant of the subject matter and of the party to this tax proceeding. He was invested with the power and it was his duty to ascertain and determine whether or not the jurisdictional notice had been served upon the complainant and if it had been to confirm the assessment of its property and send it forward for the levy. The assessment roll and the warrant formed the record of his adjudication of this issue and it seems to me that they and that judgment which they evidence are impervious to collateral attack under the authorities which have been cited and that they can be avoided or restrained in a federal court only by a plenary suit like that in hand upon the ground of fraud, mistake or other like basis for relief in equity.

In my opinion the roll and the warrant until avoided or restrained in equity constitute a perfect justification of a distraint by the treasurer, a complete answer to an action of trespass in a federal court for such distraint, incontrovertible proof of a cause of action to recover the tax in such a court where equitable defenses are not available in actions at law, and the complainant has no adequate remedy at law for the threatened collection of the unjust tax.

Moreover, the fact that the assessment upon which the defendant relies to support the tax shows property of the complainant of the value of $66,300.00 within the jurisdiction of the treasurer, together with the legal presumption that a state of things once shown to exist will continue for a reasonable time, seems to me ample proof that the complainant has property liable to respond to the endeavors of the treasurer to collect this tax and a just estoppel of the defendant who did not deny this fact in his answer from denying it now. For these reasons this bill appears to me to disclose an assessment made by fraud or mistake without due process of law upon which a tax has been illegally founded which the defendant is about to collect out of the property of the complainant and that it will suffer irreparable injury in that this unconscionable tax will be collected from it and there will be no way in which it may recover it back without this suit in equity, or another of similar character. Here are safe and ample grounds for an injunction against the illegal tax. The facts and the law seem to me to place this case on all fours with that of the National Surety Company v. State Bank, 56 C. C. A. 657, 664, 120 Fed. 593, 600. In that case the Surety Company, pursuant to a requirement of a statute of Nebraska, appointed the auditor of the State its attorney on whom process against it might be served in any action. An action was brought against it, the summons therein was served upon the auditor who, by accident or mistake, failed to forward it to the Surety Company and a judgment was rendered against it by default in one of the courts of the State of Nebraska for $7,842.40, on a cause of action to which it had a meritorious defense. A suit was brought in the United States Circuit Court in that district to enjoin the execution of that judgment of the state court. This court quoted the declaration of Chief Justice Marshall in Marine Insurance Company v. Hodgson, 7 Cranch 332, 336, that: "Any fact which clearly proves it to be against conscience to execute a judg-

ment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.", and granted the relief sought. I am of the opinion that the unconscionable judgment of an assessor rendered through fraud, accident or mistake without the due process of law and the opportunity to be heard required by the constitution and the law is not less sacred and is as remediable in equity as the unconscionable judgment of a court.

Filed April 27, 1910.

(*Decree in Cause No.* 3328.)

And on the twenty-seventh day of April, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in cause No. 3328, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

WEDNESDAY, *April* 27, 1910.

No. 3328.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, a Municipal Corporation, and The Board of County Commissioners of the City and County of Denver.

Appeal from the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that James F. Benedict, Treasurer of the City and County of Denver, a municipal corporation, and The Board of County Commissioners of the City and County of Denver, have and recover against The Singer Sewing Machine Company of New Jersey the sum of twenty dollars for their costs herein and have execution therefor.

April 27, 1910.

(Petition for and Order Allowing an Appeal to Supreme Court U. S. in Cause No. 3328.)

And on the nineteenth day of April, A. D. 1911, a petition for and order allowing an appeal to the Supreme Court of the United States was filed in cause No. 3328, in the words and figures following, to-wit:

The United States Circuit Court of Appeals for the 8th Circuit.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,

vs.

JAMES F. BENEDICT, Treasurer of the City and County of Denver, a Municipal Corporation, and The Board of County Commissioners of the City and County of Denver, Appellees.

The Appellant in the above entitled action respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the 8th Circuit and that a judgment and decree has therein been rendered on the 27th day of April, 1910, affirming the decree of the Circuit Court of the United States for the District of Colorado, and that the matter in controversy in said suit exceeds One thousand dollars besides costs.

That this cause is one in which the United States Circuit Court of Appeals for the 8th Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said Appellant prays that an appeal be allowed it in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the 8th Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said Appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

R. H. GILMORE,
Attorney for Appellant.

An appeal to the Supreme Court of the United States, as prayed for in the foregoing petition, is allowed this Nineteenth day of April, A. D. 1911.

ELMER B. ADAMS,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) The United States Circuit Court of Appeals for the 8th Circuit. No. 3328. The Singer Sewing Machine Company of New Jersey, a corporation, Appellant, vs. James F. Benedict, Treasurer of the City and County of Denver, a municipal corporation,

and The Board of County Commissioners of the City and County of Denver, Appellees. Petition for and Order allowing an Appeal to the Supreme Court of the United States. R. H. Gilmore, Attorney for Appellant. Filed Apr. 19, 1911. John D. Jordan, Clerk.

(*Assignment of Errors on Appeal to Supreme Court U. S. in Cause No.* 3328.)

And on the nineteenth day of April, A. D. 1911, an assignment of errors on appeal to the Supreme Court of the United States was filed in cause No. 3328, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the United States in and for the Eighth Circuit.

SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver, and The Board of County Commissioners of the City and County of Denver.

Assignment of Errors.

Now comes the appellant, Singer Sewing Machine Company, of New Jersey, by R. H. Gilmore, its solicitor, and says that in the record and proceedings and in the final decree made and entered herein on the 27th day of April, 1910, there is manifest error in that the United States Circuit Court of Appeals for the Eighth Circuit erred, in this, to-wit:

1. In holding and deciding against the appellant and in affirming the decree of the Circuit Court and dismissing the complainant's bill of complaint.

2. In not reversing the decree of the Circuit Court and in not granting to the complainant a writ of injunction restraining the defendants from proceeding to collect the tax levied by the officers of the City and County of Denver against the complainant for the year 1905, as set forth in the said bill.

3. In not reversing the decree of the Circuit Court and in not granting the prayer of the complainant that a decree be entered declaring null and void the assessment and tax against the complainant for the year 1905 as to the valuation of Sixty-two thousand five hundred dollars ($62,500) described in the bill, over and above the Thirty-eight hundred dollars ($3800) returned by the complainant for taxation.

4. In not finding that the situs for taxation of the complainant's property for the year 1905 upon which Sixty thousand dollars ($60,000) of the total raise in assessment was based, was outside of the State of Colorado.

5. In not finding, according to the contention of the complainant,

that the tax levied upon the credits of the complainant for the year 1905 was a tax upon interstate commerce.

6. In not finding that this action was a case for the exercise of equity jurisdiction on the ground that it appeared that the exercise of such jurisdiction would prevent a multiplicity of suits.

7. In not finding that the equity jurisdiction of the Court should be exercised in this suit because the complainant had no plain, adequate and complete remedy at law.

8. In not finding that the equity jurisdiction of the Court should be exercised in this suit because the illegality of the tax described, or the vital defects therein, do not appear upon the face of the record of the County officers, but must be shown by evidence alunde.

9. In entering a decree against the complainant and in favor of the defendants, in that the said decree is contrary to the law of this case and the facts proven therein.

10. In not sustaining the complainant's contention and so finding that the complainant had no plain, adequate and complete remedy at law.

11. In holding and deciding that the bill of complaint in this suit does not set forth a recognized ground of equitable jurisdiction.

12. In holding and deciding that there was no fraud, accident, mistake or danger of a multiplicity of suits alleged in the pleadings and proofs herein.

13. In holding and deciding that the pleadings and proofs herein did not show that the complainant had property in Denver subject to distraint for the tax of 1905, referred to in the bill.

14. In holding and deciding that the pleadings and proofs herein did not show that the complainant would be injured or embarrassed by any distraint or sale of its property for the purpose of collecting the tax of 1905, referred to in the bill.

15. In holding and deciding that the pleadings and proofs herein did not show that a distraint was threatened in order to collect the said tax of 1905, referred to in the bill.

16. In holding and deciding that in case of a distraint of complainant's property for the collection of the tax for 1905, referred to in the bill, complainant has a plain, adequate and complete remedy at law.

17. In holding and deciding that in case an action were brought by the proper authorities of the City and County of Denver to collect the said tax for 1905, referred to in the bill, the complainant has a plain, adequate and complete remedy at law.

18. In omitting to hold and decide that where a tax assessed by State officers is illegal and invalid, and there is no plain, adequate and complete remedy at law available under the statute under which the tax purported to be assessed, the party against whom the tax was assessed is entitled to equitable relief.

19. In holding and deciding that a Court of equity cannot enjoin the collection of said tax, in default of some other and recognized ground for equitable intervention, notwithstanding the pleadings and proof show that the State statute requires notice to the

complainant of a raise in its assessment, and that no such notice appears on the face of the tax proceedings and that no such notice was, in fact, given, and that complainant had no knowledge of the raise until the time had elapsed within which to apply for correction under the laws of the State.

20. In omitting to hold and find that the tax for 1905 levied upon the credits of the complainant, passing through the City and County of Denver as the proceeds of transactions made outside of the State of Colorado, in nine other states and territories, in the course of transmission to a state outside of the State of Colorado, was a tax upon interstate commerce.

21. In holding and deciding that the bill is without equity for not alleging accident, mistake or fraud, although the bill and proof show that the assessor, from oversight, error or design, omitted to send complainant the notice of raise of assessment required by the State statute.

22. In omitting to hold that a tax upon the property of complainant was taking complainant's property without due process of law, where it was alleged and shown that complainant had filed its schedule for taxation showing property valued at Thirty-eight hundred dollars ($3800) and that the assessor of the City and County of Denver, without notice to the complainant as required by the State statute, had raised the valuation to Sixty-six thousand three hundred dollars ($66,300), and that complainant had no knowledge or information as to such raise until after the assessment and levy had passed into the hands of the collecting agent beyond any opportunity for correction.

23. In omitting to hold that the State tax described in the bill herein was, under the circumstances therein specified and shown by the proof, void, under the provisions of the 14th Amendment of the Constitution of the United States.

24. In holding and deciding that a tax based upon a valuation illegally raised by the assessor, as specified in the bill herein and shown by the proof, can be attacked collaterally.

25. In holding and deciding that a federal court of equity has no jurisdiction to grant relief against the collection of a state tax, where it was shown by the bill that the tax was levied without jurisdiction on the part of the taxing officers, and where it was contended that the bill did not in express terms allege that the tax-payer, whose property was so levied upon, had property within the jurisdiction of the State subject to distraint for the collection of such excessive tax; but where it did appear from the pleadings that the complainant had property in the County subject to distraint exceeding in value the amount of the tax.

26. In holding and deciding that notwithstanding the overruling of the demurrer herein, the interposing of the answer and the trial had on the merits, the defendants could still contend that the bill does not contain matter of equity entitling complainant to relief against the defendants, and that the Circuit Court of Appeals could consider such contention.

Wherefore, the appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

R. H. GILMORE,
Solicitor for Appellant.

(Endorsed:) The United States Circuit Court of Appeals for the 8th Circuit. No. 3328. The Singer Sewing Machine Company of New Jersey, a corporation, Appellant, vs. James F. Benedict, Treasurer of the City and County of Denver, a municipal corporation, and The Board of County Commissioners of the City and County of Denver, Appellees. Assignment of Errors. R. H. Gilmore, Attorney for Appellant. Filed Apr. 19, 1911. John D. Jordan, Clerk.

(*Affidavit as to Amount in Controversy in Cause No.* 3328.)

And on the nineteenth day of April, A. D. 1911, an affidavit as to amount in controversy was filed in cause No. 3328, in the words and figures following, to-wit:

In the Supreme Court of the United States.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver et al., Appellees.

J. F. Kelly of the City and County of Denver, being duly sworn, on oath says:

That he is General Agent of the Appellant for a district composed of nine states and territories mostly within the region of the Rocky Mountains, and acquainted with its business affairs in this district.

That the amount in controversy in said action exceeds the sum of Two Thousand Dollars occasioned by the raise of the assessment as made out and delivered to the Assessor of the City and County of Denver for the year 1905, from the sum of Three Thousand Eight Hundred Dollars ($3800.) to Sixty Six Thousand Three Hundred Dollars ($66,300.).

That the amount of the tax levied upon the said sum of Sixty Two Thousand Five Hundred Dollars ($62,500.) the excess, exceeds the sum of Two Thousand Dollars.

That the amount of the said tax is the amount in controversy in this action exclusive of interest and costs.

J. F. KELLY.

Subscribed and sworn to before me this fourth day of March, A. D. 1911.

My commission expires December 30, 1914.

[SEAL.] KATE WILLIAMS,
Notary Public in Aforesaid County.

(Endorsed:) The Supreme Court of the United States. No. 3328. The Singer Sewing Machine Company of New Jersey, a corporation, Appellant, vs. James F. Benedict, Treasurer of the City and County of Denver, a municipal corporation, and The Board of County Commissioners of the City and County of Denver, Appellees. Affidavit as to Amount in Controversy. R. H. Gilmore, Attorney for Appellant. Filed Apr. 19, 1911, John D. Jordan, Clerk.

(*Bond on Appeal to the Supreme Court of the United States in Cause No.* 3328.)

And on the nineteenth day of April, A. D. 1911, a bond on appeal to the Supreme Court of the United States was filed in cause No. 3328, in the words and figures following, to-wit:

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
Appellant,
vs.
JAMES F. BENEDICT, Treasurer of the City and County of Denver et al., Appellees.

Know All Men By These Presents, that we, The Singer Sewing Machine Company of New Jersey, and The Fidelity and Casualty Company of New York, of the City, County and State of New York, are held and firmly bound unto James F. Benedict, Treasurer of the City and County of Denver, Colorado, and the Board and County Commissioners of the City and County of Denver, Colorado, in the sum of One Thousand Dollars ($1,000.00), to be paid to the said James F. Benedict, Treasurer of the City and County of Denver, Colorado, and the Board of County Commissioners of the City and County of Denver, Colorado, we bind ourselves and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 16th day of March, A. D. 1911.

Whereas the Appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the 8th Circuit on the 27th day of April, 1910.

Now, therefore, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY,
By A. K. BOURNE, *Treasurer.*

[Corporate Seal.]

[SEAL.] THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By HALE ANDERSON, *Attorney.* 450880.

The foregoing bond is approved this 19th day of April, A. D. 1911.

ELMER B. ADAMS,
United States Circuit Judge, 8th Circuit.

The Fidelity and Casualty Company of New York, 92 Liberty Street, New York City.

Fidelity Department: Edward C. Lunt, Superintendent.

STATE OF NEW YORK,
City and County of New York, ss:

On the 17th day of March, 1911, before me personally came Hale Anderson, to me known, who, being by me duly sworn, did depose and say that he was the attorney of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the annexed instrument; that he knew the corporate seal of the said corporation; that the seal affixed to the annexed instrument was the corporate seal of The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of the said company; that he signed his name thereto by like order and authority as attorney of the said company;

He did further depose and say that the following was a true copy of an extract from the minutes of the meeting of the board of directors of the said company held at its office in the city of New York on July 20, 1910, a quorum being present, and that the resolution contained in the said extract had been unanimously adopted, and was then in full force and effect:

Resolved, that each of the following persons—to wit, George F. Seward, president of the company; Robert J. Hillas, vice-president and secretary of the company; Henry Crossley, assistant secretary of the company; Frank E. Law, assistant secretary of the company; George W. Allen, assistant secretary of the company; Frederick R. Jones, assistant secretary of the company; Edward C. Lunt, attorney; Peter F. Hopper, attorney; James Cox, attorney; George W. Varian, attorney; William L. Macalister, attorney; and Hale Anderson, attorney—is hereby authorized to execute on behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and contracts of suretyship, and to bind the company as surety thereon; and to attest the corporate seal of the company to any and all bonds, undertakings, and contracts of suretyship signed by the president of the company, the vice-president and secretary, or by any of the said assistant secretaries or attorneys named herein: provided—

1. That the authority herein granted to Edward C. Lunt and Peter F. Hopper shall be limited to bonds, undertakings, and contracts of suretyship of not more than twenty-five thousand dollars, unless the said bonds, undertakings, or contracts of suretyship shall also be signed by the president, the vice-president and secretary, or one of the said assistant secretaries of the company;

2. That the authority herein granted to Hale Anderson shall be limited to bonds, undertakings, and contracts of suretyship of not more than ten thousand dollars, unless the said bonds, undertakings, or contracts of suretyship shall also be signed by the president, the vice-president and secretary, one of the said assistant secretaries, or one of the said attorneys named herein;

3. That the authority herein granted to James Cox, George W. Varian and William L. Macalister shall be limited to bonds, undertakings, and contracts of suretyship of not more than twenty-five thousand dollars required by the customs regulations or the Internal Revenue Department regulations of the United States of America.

Resolved, further, that the appointment of each of the persons named herein to his respective office or position is hereby confirmed.

He did further depose and say that the said company had been duly and legally incorporated under the laws of the state of New York; that the said company had complied with, and was then complying with, the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the said company was duly licensed and authorized to transact business in the state of Colorado; and that the assets of the said company, unencumbered and liable to execution, exceeded its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of two million dollars.

[SEAL.] JAMES P. PHILLIPS,
Commissioner of Deeds, City, County and State of New York.

Financial Statement of The Fidelity and Casualty Company of New York.

Home Office, 92 Liberty Street, New York.

Bonding Department, Edward C. Lunt, Superintendent.

Assets.

Stocks and Bonds	$7,006,844.50
Real Estate	1,399,603.66
Cash in Banks and Office	276,487.10
Gross Premiums in course of collection (not overdue)	1,129,289.34
All other Assets	47,205.65
	$9,859,430.25

Liabilities.

Reserved for Unearned Premiums		$4,230,357.89
Liability losses.	Claims resisted for policyholders	732,100.00
	In process of adjustment	216,425.00
	Further Reserve under N. Y. law of 1905	287,228.18
Steam Boiler Losses, in process of adjustment		12,596.00
All Other Losses, in process of adjustment		881,938.70
Commission on Premiums in course of collection		303,336.16
All other Liabilities		249,752.48
Capital Stock $1,000,000.00 / Net Surplus 1,945,695.84	Surplus to policyholders	2,945,695.84
		$9,859,430.25

STATE OF NEW YORK,
County of New York, ss:

Hale Anderson, being duly sworn, deposes and says that he is the Attorney of the Fidelity and Casualty Company of New York, and that the foregoing statement, to the best of his knowledge and belief, is a full, true, and correct statement of the financial condition of the said Company on the thirty-first day of December, 1910.

HALE ANDERSON, *Attorney.*

Acknowledged and sworn to before me, and subscribed in my presence, this 27th day of February, 1911.

[SEAL.] JAMES P. PHILLIPS,
Commissioner of Deeds, City of New York.

(Endorsed:) The United States Circuit Court of Appeals for the 8th Circuit. No. 3328. The Singer Sewing Machine Company of New Jersey, a corporation, Appellant, vs. James F. Benedict, Treasurer of the City & County of Denver, a municipal corporation, and The Board of County Commissioners of the City and County of Denver, Appellees. Bond on Appeal to the Supreme Court of the United States. R. H. Gilmore, Attorney for Appellant. Filed Apr. 19, 1911, John D. Jordan, Clerk.

(Citation on Appeal to Supreme Court, U. S., and Acknowledgment of Service in Cause No. 3328.)

And on the twenty-sixth day of April, A. D. 1911, a citation on appeal to the Supreme Court of the United States, with acknowledgment of service, was filed in cause No. 3328, the original of which is hereto attached and herewith returned:

The United States of America to James F. Benedict, Treasurer of the City and County of Denver, a municipal corporation, and The Board of County Commissioners of the City and County of Denver, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein The Singer Sewing Machine Company of New Jersey, a corporation, is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against the said Appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this Nineteenth day of April, A. D. 1911.

ELMER B. ADAMS,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Denver, April 22, 1911.

We hereby acknowledge the receipt of a copy of the above citation and service of the same upon the respondents and appellees in said action at Denver, Colorado.

MILTON SMITH,
CHARLES R. BROCK,
Attorneys for Appellees.

[Endorsed:] No. 3328. The Singer Sewing Machine Co., a corporation, Appellant, vs. James F. Benedict, Treasurer, etc., et al. Citation on Appeal to Supreme Court U. S. Filed Apr. 26, 1911. John D. Jordan, clerk.

(Stipulation to Omit Certain Matters from Transcript on Appeal to Supreme Court U. S.)

And on the twenty-sixth day of April, A. D. 1911, a stipulation to omit certain matters from the transcript on appeal to the Supreme Court of the United States was filed in cause No. 3328, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3328.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, a Corporation, Appellant,
vs.
JAMES F. BENEDICT and the Board of County Commissioners of the City and County of Denver, Appellees.

Stipulation as to Transcript.

It is hereby stipulated by and between the parties to the above entitled action that in making up a Transcript on appeal to the Supreme Court of the United States in case No. 3328, the Clerk may omit from such Transcript the following mentioned papers and proceedings in case No. 3166, between the same parties, to-wit: Petition for Supersedeas and restraining order, waiver by Appellees of service of restraining order, submission of petition for restraining order, order granting supersedeas, etc., and injunction and supersedeas bond, and each party waives all exceptions and objections to the said Transcript because of such omissions.

Dated April 24, 1911.

R. H. GILMORE,
Solicitor for Appellant.
MILTON SMITH,
CHAS. R. BROCK,
Solicitors for Appellees.

(Endorsed:) No. 3328. In United States Circuit Court of Appeals. The Singer Sewing Machine Company v. James F. Benedict, Treasurer, etc., et al. Stipulation to omit certain matters from transcript on appeal to Supreme Court. Filed Apr. 26, 1911, John D. Jordan, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, except those matters directed to be omitted from the transcript by the stipulation of the parties appearing at page 94 of this transcript, in a certain cause in said Court wherein The Singer Sewing Machine Company of New Jersey is Appellant and James F. Benedict, Treasurer of the City and County of Denver, et al., are Appellees, No. 3328, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the Eighteenth day of August, A. D. 1910, a mandate was issued out of said Circuit Court of Appeals in said cause directed to the Judges of the Circuit Court of the United States for the District of Colorado.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this Eighth day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 22,668. U. S. Circuit Court Appeals, 8th Circuit. Term No. 596. The Singer Sewing Machine Company of New Jersey, appellant, vs. James F. Benedict, Treasurer of the City and County of Denver, and The Board of County Commissioners of the City and County of Denver. Filed May 12th, 1911. File No. 22,668.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

THE SINGER SEWING MACHINE COMPANY OF NEW JERSEY, APPELLANT,

vs.

JAMES F. BENEDICT, TREASURER, ETC., ET AL., APPELLEES.

REPLY BRIEF OF APPELLANT.

The appellees concede that appellant's statement of the case is fair by adopting it and by suggesting no amendments.

As to the Demurrer to Bill.

No one can sincerely contend but that the order overruling the demurrer is an adjudication, and the decision of the court thereon becomes the law of the case, unless, in the progress of the proceedings, a different order was made. Here no different order was made.

If the plea (?) raises a question as to the sufficiency of the bill, the question was never passed upon by the trial court; hence it is, so far as the plea is concerned, raised for the first time on appeal.

Had the questions presented by plea in the answer been

passed upon by the trial court adversely to plaintiff an opportunity for amendment would have been given, as this court held in

Walla Walla *vs.* Walla Walla, etc., 172 U. S., 1.

The question of the adequacy of the allegations of an "adequate remedy at law" was consequently waived.

See citations on page 5 of brief, and

Milwaukee *vs.* Kaeffler, 116 U. S., 219.

As to *waiver* see citations on page 8 of brief.

The statement that these cases do not apply is incorrect, which leads us to conclude that the counsel did not take time to examine them. We also presented argument and citations, on page 9 of brief, showing that the question of the sufficiency of the bill as to adequacy of legal remedies is raised too late on appeal.

It is apparent that this question is an afterthought, because the hearing was had and decided on the *merits* of the case, and counsel so treated it. After the *appeal* had been perfected both counsel recited (page 58 of Record), in a stipulation, that they were "desirous that the MERITS of the questions involved herein should be determined by the court as soon as possible," and for that purpose it was agreed that the case should be heard on the appeal at St. Louis instead of waiting for it to come up in due course before the same appellate court nine months later at Denver.

Adequacy of Legal Remedy.

The bill shows that the only remedy for the errors of the assessor in increasing the assessment is a hearing before the assessor and an appeal from him to the courts, based on a *jurisdictional notice* which he never gave. The omission of that notice was *fraud, accident* or *mistake,* all well recognized grounds for equitable relief. The lack of this notice deprived the plaintiff of the only judicial remedy provided

for in the act. The want of this notice made the tax warrant issued to the treasurer, though valid on its face and at law, void when brought to the attention of a court of equity. The invalidity of the warrant, presumably based on notice, could not be shown in a collateral proceeding in a Federal law court.

Appellant admits (p. 5) in brief that the bill sets up both the illegality of the tax and the inadequacy of any remedy at law.

The notice was essential to the "due process of law" provided for in the act. The Supreme Court of Colorado, having the same statute and notice under consideration in

Gale vs. Statler, 47 Colo., 72, 77

held (*a*) that the failure to give the notice deprives the taxpayer of a substantial right, conferred by the statute, and that the tax was consequently void; (*b*) that the collection of the tax levied upon the sum added by the assessor without notice will be enjoined; (*c*) that the fact that the taxpayer might obtain relief by application to the Board of County Commissioners does not deprive him of his right to injunction.

This case is important, because it is a decision of the Supreme Court of Colorado construing this very statute, which, under the rules, the Federal court follows.

The same doctrine was laid down by the Circuit Court of Appeals (Eighth Circuit) construing the same Colorado statute in Atchison, T. & S. F. Ry. Co. *vs.* Sullivan, 97 C. C. A., 1.

It is worthy of note that the Statler case in the Supreme Court and the Sullivan case in the Court of Appeals, were decided by different appellate tribunals in different forums in the same month—September, 1909—each arriving at the same conclusions on the same law, without knowledge of the decision of the other. In this connection it should be noted that, while Federal courts had jurisdiction to the amount of $2,000 in 1906, when this was commenced, the

amount has since been raised to $3,000. If the court should find that plaintiff had an adequate remedy at law in a Federal court in 1906, he would not have such remedy now, because a Federal law court could not entertain a case involving less than $3,000. This being a court of equity it will take cognizance of the equitable conditions now prevailing.

We may further remark that Equity Rules 22 and 23, now in force, would not permit a case to be dismissed as cognizable only in a law court, bacause it is therein provided, "if a matter ordinarily determinable at law arises such matter shall be determined in that suit according to the principles applicable, without *sending the case or question* to the law side of the court."

This new rule recognizes the demand of the times that questions between litigants shall be determined on their merits rather than on technical grounds of practice.

We may further add that the new rule which abolishes demurrers, Rule 29, and requires a defense in point of law going to the whole of the cause of action to be made by motion to dismiss or answer, and disposed of before final hearing in the discretion of the court, has been followed in this case under other names. The point was raised by demurrer and overruled by the court before final hearing. Having once been disposed of finally by the court below, it is not within the spirit of this rule that it should now be again raised in this court.

Evidence as to Omission of Notice.

Appellees recognizing the importance of the propositions based on failure of the assessor to give the statutory notice of the change in the assessment, endeavor to minimize the evidence and say the evidence shows that only a *"subordinate clerk"* failed to get the notice. He, as a witness (p. 23), said he had been chief clerk in the Denver Central Agency of the Singer Company seven or eight years; that he had

(p. 28) "general supervision of the entire office"; that the notice from the treasurer, dated *January* 15, 1906, after the tax-roll and warrant had passed beyond the control of the assessor and was in the collecting agency of the State, who had no discretion but to collect, was the *first* "notice, or *knowledge* or information" HIS "OFFICE had of the *raising* of the tax assessment" (p. 26). This notice was received at the Singer office in January, 1906 (p. 27). No previous notice had been received (p. 27).

We observe that both the majority and minority opinions in the Circuit Court of Appeals base their views on the fact that no notice whatever was given by the assessor. Had such notice been given the assessor was there in Denver and the records of his office were there and if any notice had been mailed it was capable of proof by the county officials.

Mailing Notice to New York or New Jersey.

In sheer desperation appellees contend that we did not negative the fact that the notice of the raise may have been sent to New York or New Jersey. The schedule was made in Denver, by an agent in Denver, returning a list of property in Denver, to be taxed in Denver, taxes to be paid in Denver, and they *now* contend that the assessment was made on credits or business done in Denver; that the company had taxable property to the amount of $62,500 in Denver, where the central agency, which controls the business, is located. Yet counsel contends it was incumbent on us to show that the assessor did not commit the fraud or folly of going through the form of sending a notice of his act out of the State when the obvious place to give the notice under the statute was to the party who made the return on the tax schedule in Denver.

As to the Threat.

The notice in October, 1906, was for $2,284 overdue taxes or the treasurer would enforce the collection at the taxpayers' expense. The notice refers to and incorporates the sections of the statute relating to the enforcement of payment. The only section relating to enforcing the collection relates to *distress* of *personal* property. The treasurer had a warrant equivalent to an execution in the hands of a sheriff. If a sheriff should notify a judgment defendant that he had an execution directing the collection of $2,284, and that, if not paid, he would proceed to collect as provided by law, his meaning would be obvious and if the judgment defendant believed the judgment was void in equity the necessity for immediate action would be imperative.

No Property in Denver.

Without attempting to answer our brief, showing the plaintiff had property in Denver, or the minority opinion of Judge Sanborn in the Court of Appeals, counsel asserts the contrary and concludes we were in no danger of distress, because we had no property in Denver capable of being destrained. That is hardly in harmony with the contention that plaintiff had $62,500 of taxable property besides the $3,800 which plaintiff returned.

As to Averment of Jurisdictional Amount.

On page 29 appellees claim that the bill lacks a proper averment of the jurisdictional amount.

The bill alleges (Record, p. 1) "that the amount in controversy in this action exceeds the sum of $2,000."

Such an averment was sustained as sufficient in Butchers' & Drovers' Stock Yard Co. *vs.* L. & N. Ry. Co., 67 Fed., 35

(Circuit Court Judges Taft and Lurton and District Judge Severens), and also in Pine *vs.* Mayor, etc., of N. Y., 103 Fed., 337 (Circuit Judge Shipman).

Furthermore, the bill shows (p. 7), that the total tax is $2,154.75 and (p. 8) that we concede $126.50 to be due. This leaves $2,028.25 in controversy, without a suggestion of interest or costs.

In Colorado, under a statute requiring a complaint to state that the amount in controversy is *less* than $2,000, it has been held sufficient if such fact appear anywhere from the complaint.

Barndollar *vs.* Patton, 5 Col., 49.
Hughes *vs.* Brown, 7 Col., 587.

This bill has also been tested by demurrer (R., p. 16), which has been overruled, and an answer interposed raising no such point (p. 18), and a trial has been had on the merits and the equities found with the defendants (p. 45), at which trial was introduced evidence (p. 40) in the form of a notice showing the tax without interest to be $2,154.75.

Subsequently counsel for appellees made a stipulation (p. 58) expressing their desire "that the merits of the questions involved therein should be determined by the court as soon as possible."

Appellant submits that this point cannot, in good conscience, be pressed now.

On page 48 of their brief appellees, for the purposes of this suit, waive the contention that the written evidences of debt received at Denver from States and Territories other than Colorado are taxable in Denver.

In view of this concession, and in view of the answer (R., p. 20) alleging in effect that by reason of the business done in ten States and registered in the Denver agency appellant should pay taxes in Denver on $60,000 more than it returned, and in view of the cross-examination by appellees' counsel

(R., p. 33) endeavoring to bring out the total of the business passing through the Denver office, appellant submits that at least this is an attempt to tax "a proportion of total gross receipts, a considerable part of which the State had no right to tax," and seems exactly within the condemnation of the case of Oklahoma *vs.* Wells Fargo Co., 223 U. S., 298.

A Discussion of Certain Cases.

In Buck *vs.* Beach, 206 U. S., 392, the court held certain notes not to be taxable in Indiana. From this case appellees seem to draw the amazing conclusion that the notes would be taxable in Ohio (their brief, page 37), and on this pure assumption they quote the case as if an authority for taxing in Colorado the credits in the case at bar. It is, of course, no such authority.

In discussing People *ex rel.* Burke *vs.* Wells, 208 U. S., 14 (at page 44 of their brief), appellees fail to make it clear that the items upheld as taxable in New York were office furniture and *cash* in New York and *notes* in New York *kept* and *used* "as capital invested in the State" (the words of the statute) in a going business. The court declined to say whether open accounts receivable would be taxable, not deeming that question to be in the case.

The balance of pages 30 to 52 of appellees' brief is given to a consideration of the line of cases dealing with the Louisiana Statute. From these cases appellees make copious extracts that only tend to confuse, because the brief takes no note of the radical difference between the Louisiana Statute and the Colorado Statute. This confusion seems even to have reached the mind of counsel, for in making their brief they have placed in italics (at page 50), as if favorable to their argument and so not to be missed by the court, the very strong provisions of the statute in Louisiana that serve to distinguish it so sharply from the Colorado law.

The two laws may be found in appellant's brief, the Louis-

iana law at page 58 and the Colorado law at page 39. The profound difference is apparent and in this connection the chronology of events may be helpful in construing the Colorado law.

The Colorado statute was enacted first in 1876 (in the form shown on our brief, p. 50), and in almost verbatim the same form was re-enacted in 1902.

At that time, 1876, the case of State Tax on Foreign Held Bonds, 15 Wall., 300, seems to have been thought, in Colorado, to be authority for the proposition that debts could not be taxed apart from the creditor's domicile, and that doctrine was adopted and followed in Arapahoe County *vs.* Cutter, 3 Colorado, 349, in 1877.

The same doctrine was restated and applied to this Colorado statute of 1876 in the case of Hathaway *vs.* Choury, 14 Col. App., 478, decided in 1900, and this may be regarded as the last word on the construction of the Colorado law.

Meanwhile, in Louisiana, in 1890, its far-reaching statute was enacted. At first credits alone were held absolutely nontaxable (L., L. & G. Ins. Co. *vs.* Assessors, 44 La. Ann., 760). Presently notes and mortgages held in New Orleans by an agent of the New York owner were taxed in Louisiana, and in 1899 that tax was upheld in New Orleans *vs.* Stempel, 175 U. S., 309, the Supreme Court laying stress upon their being in concrete form and in the State. The court was divided, a dissent being noted by Mr. Justice Harlan and Mr. Justice White.

Then notes or obligations held within Louisiana by an agent of the non-resident owner for purposes of collection and renewal and reinvestment as a continuing business were taxed. This tax was also upheld by the Supreme Court in 1903 in Assessors *vs.* Comptoir d'Escompte, 191 U. S., 388, stress still being laid on the concrete form of the evidence of the debt, the importance of that element leading the court to hold that a check treated as an overdraft was the equivalent of a note.

Then loans made in Louisiana by a foreign insurance company on its own policies and evidenced by notes sent out of the State were taxed and the tax upheld in 1907 in Met. Life Ins. Co. *vs.* New Orleans, 205 U. S., 395, this court frankly stating that in the two preceding cases "the dominant factor in the decisions" was the presence in the State of the concrete securities, but now laying stress upon the broad wording of the Louisiana statute and the decisions of the State courts thereon.

Finally premiums owed in open account by residents of Louisiana to a foreign insurance company were again taxed and the tax this time upheld by the Louisiana court and the judgment affirmed by this court in L. L. & G. Ins. Co. *vs.* Orleans Assessors, 221 U. S., 346, following the Louisiana decision.

Meanwhile the Colorado statute and the decisions thereon have remained in narrow form, pretending to tax only the moneys (not credits) of non-residents and only in certain cases and this statute has been construed by the Supreme Court of Colorado not to include notes, mortgages and deeds of trust due to non-residents even when the securities are in the State (Hathaway *vs.* Choury, 14 Col. App., 478.

The Colorado statute, as construed by Colorado courts, is no warrant for the tax in the case at bar.

Respectfully submitted,

R. H. GILMORE,
HENRY A. PRINCE,
Solicitors for Appellant.

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IN THE

Supreme Court

OF THE

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THE SINGER SEWING MACHINE COMPANY, OF NEW JERSEY, *Appellant*,

vs.

JAMES F. BENEDICT, TREASURER OF THE CITY AND COUNTY OF DENVER, AND THE CITY AND COUNTY OF DENVER, *Appellees.*

Brief of Appellant.

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vs.

JAMES F. BENEDICT, TREASURER OF THE CITY AND COUNTY OF DENVER, AND THE CITY AND COUNTY OF DENVER, *Appellees.*

Brief of Appellant.

This is a suit in equity begun, in the Circuit Court of the United States for the District of Colorado, by The Singer Sewing Machine Company of New Jersey against James F. Benedict, Treasurer of the City and County of Denver and others. Decree for defendants on the *merits* of the cause, from which Complainant appealed to the Circuit Court of Appeals, where the suit was dismissed by *divided* court, because the suit was not of equitable cognizance.

STATEMENT.

The Statement of the case in the opinion by Adams, Circuit Judge, is, in the main, correct, omitting however, some details which we regard important, but, in order to avoid confusion, we shall follow his statement, except in the particulars which we believe should be inserted.

The Singer Sewing Machine Company of New Jersey, a foreign corporation, made a return of taxable personal property for the year 1905 to the assessor of the City and County of Denver at a value of $3,800. This was on stock of merchandise and office furniture. To this, the assessor, *without notice, added* $60,000 on *"promissory notes, accounts, bank stock, and deposits in banks outside of Colorado,* and $2,500 on "all other property," the character and nature of which was not specified. A *tax list* and *warrant*, prepared by the assessor, authorizing the collection of taxes from the company on the total assessment of $66,300, was delivered to the City and County Treasurer, whose duty it was to collect all the taxes assessed thereon. Afterwards the Company tendered to the treasurer $136.30, the amount of taxes with accrued interest, due on $3,800 worth of property returned by it for taxation, and refused to pay the taxes assessed on the additions of $62,500 made by the assessor, on the ground that the same was assessed on property *located outside* of the State of Colorado, and *not within* the taxing jurisdiction of the City and County of Denver. By this suit it was sought to declare the tax *void* and to *enjoin* the treasurer from executing his threat to enforce the collection of it.

The Company contended that the tax was void, because, (1) the assessor gave the company no notice of the additional assessment prior to the first day of August (or at any other time) as required by the "Revenue Act" of Colorado before the additional assessment could be made, and (2) the additional assessment was on moneys, notes and contracts, being proceeds of business of the company in nine states and territories, which, in the *regular course of business* of the company, passed through the local office of the company in Denver for the purpose of accounting and supervision, on their way to their ultimate destination, the home office of the company, beyond the limits of the State of Colorado, and (3) that this was a tax on interstate commerce, and (4) that the assessment was an attempt to take the property of the company without "due process of law," and deny the company the "equal protection of the laws."

The Bill alleges, and the Answer admits, that the assessor, in violation of the Colorado statute, gave no notice to the company of this addition to the assessed property, thereby depriving it of any opportunity, provided by the statute, to apply to the assessor himself for redress, and an appeal to the District or County Courts, as provided by statute, and that it had no plain, speedy and adequate remedy at law against the collection of the tax, or for subsequent re-imbursement.

Equity Allegations?

Judge Adams was certainly in error, wherein in the majority *opinion*, he says:

"There are no averments *in the bill* showing fraud, accident or mistake, which conduced to the *overvalua-*

tion, or danger of multiplicity of suits, or any averments planting complainant's right to relief on any head of equity jurisdiction, excepting inadequacy of legal remedy."

(The misuse of the word "over valuation" in this connection shows that Judge Adams misconceived the theory and spirit of the *addition* to assessment of $62,500 worth of property not within the state).

The majority opinion then says:

"Complainant endeavors to forestall a consideration of this objection on the ground that defendant answered and went to trial on the *merits.* * * * In the present case jurisdiction in equity was challenged *in limine* by a demurrer on the specific ground that the bill contained no matter of equity, and upon that being overruled the *same* objection was taken by answer."

That is not exactly a statement of our position; it is true that the *sufficiency of our bill* was challenged *in limine* by demurrer, which was overruled. That was an adjudication. Respondents could have *stood on their demurrer* and appealed. In the appellate court the case could have been considered on the *facts alleged* in the bill relating, either to the jurisdiction in equity, or the merits. Instead of standing on the demurrer, the respondents filed an answer. Our contention is (1) that the decision of the demurrer was an *adjudication* and became the law of the case, unless the respondents stood thereon and appealed therefrom; (2) that if we are *incorrect in this,* then we contend that the "plea," so-called, in the answer, does not raise the question of equity jurisdiction; (3) the question of equity jurisdiction was *not passed upon* by the *trial* court, after the respondents answered, and the record does not show that it was raised at the hearing; that being true, then, (a) it was *waived* by the respondents below, and (b) it

cannot now be raised here for the first time after being waived. (4) This is *complainant's* appeal, *not* that of the respondent's. (5) The decision of the cause by the trial court was on *the merits* and the respondents are here urging the court to sustain the decision. If the trial court had jurisdiction to decide the merits of the case *favorable* to respondents, its *jurisdiction* was sufficient to decide the merits favorable to complainants.

We will consider these propositions in their order.

1. *The effect of overruling the demurrer.* The trial court by overruling the demurrer *adjudged* the *bill* to be sufficient on its face. That was an adjudication. The respondents submitted to that adjudication and answered to the whole bill. If defendants answered over, after the demurrer was overruled, instead of standing on the demurrer, which they had a right to do, they thereby waived all defects in the bill, covered by the demurrer.

Great North, etc. v. McLaughlin, 17 C. C. A., 330, 333.
Foltz v. St. Louis, etc., 8 C. C. A., 635, 641.
Huntington v. Laidley, 79 Fed., 865.
Mercantile, etc. v. Missouri, etc., 84 Fed., 383.
Bryant, etc. v. Robinson, 79 C. C. A., 259, 267.

It cures defective allegations in the bill.

Richardson v. Green, 9 C. C. A., 565.

And waives the defense of "An adequate remedy at law," if not specifically set up in the answer.

Kilbourne v. Sunderland, 130 U. S., 505, 514.
Tyler v. Savage, 143 U. S., 97.

After answer, all the facts alleged in the bill, except as expressly admitted, were treated by both parties

as at issue. If any question was raised, or considered, at the hearing as to the sufficiency of the bill, none, so far as the record shows, were *passed* upon by the Court. Hence cannot be raised here.

Foltz v. St. Louis, etc., 8 C. C. A., 635.

Both parties, relying upon the decision that the bill was sufficient, at great expense, prepared for trial on the merits. By so doing *each* party submitted the case to the court, thereby submitting to the jurisdiction, and asked for a *favorable* adjudication, which resulted in favor of the respondents. Can they now contend that the court had no jurisdiction to decide in their favor?

2. Does the plea (?) in the *answer* raise the question as to whether equity jurisdiction was invoked in the bill, which says:

"The bill of complaint does not *state such a case*, nor contain any *matter* of equity, entitling the plaintiff to *any* relief against these defendants."

Doubtless what was meant by this plea (if plea it may be called) is shown in the last paragraph of the answer (p. 20) where the answer states that plaintiff should have paid the tax and then applied to the county commissioners for relief, and the answer, doubtless referring to the provision concerning county commissioners, then says:

"And defendants allege that the *statutes of this state* afford to the defendant ample *remedy and protection*, and that the plaintiff has failed to take advantage of the provisions of the laws of the state, which are adequate in the premises."

These paragraphs of the answer do not invoke the question of the equity jurisdiction of a Federal Court. This was the position of the trial court, because the decree without again passing upon the question of juris-

diction decided on the demurrer "finds the equities of the *cause* to be in the respondents," which was a finding on the merits and the entire finding in the decree, and based thereon, the bill was dismissed.

If the so-called "plea" in the answer should be considered as raising the question whether the bill states facts sufficient to invoke the jurisdiction of an equity court, it is apparent that the respondents, by pleading in that connection *Colorado statutes*, meant that such statutes afforded adequate legal remedy in the *state* tribunals, or *quasi* tribunals. That is not sufficient. The complainant, as a citizen of another state, has, under the Federal Constitution, the right to the protection of a Federal Court.

That the complainant's remedy at law, to be adequate, must be a remedy available in a Federal Court, where the jurisdiction in equity is sought, is well settled.

Colar v. Stanley Co., 89 Fed., 257, 259.
Smythe v. Ames, 169 U. S., 466, 517.
Jones v. Mutual F. Co., 123 Fed., 518.
United States, etc. v. Cable, 39 C. C. A., 264.
Yonley v. Lavender, 21 Wall., 276.
Sheffield, etc., v. Withrow, 149 U. S., 574, 579.

It is not enough that there may be a legal remedy in a state tribunal.

Brun v. Mann, 85 C. C. A., 513, 12 L. R. A. (N. S.), 154.
Atchison, T. & S. F. Ry. Co. v. Sullivan, 97 C. C. A., 1.

Besides, state statutes being alleged are facts to be proved and the record shows no attempt to prove the statutes alleged.

3. The question of equity jurisdiction, if raised by the "plea" was not passed upon by the trial court, and was therefore (a) waived, and (b) cannot be revived by the respondents in the appellate court on the *complainant's* appeal.

(a) *As to waiver.*

Prof. Simpkins, in "A Federal Equity Suit," p. 31, says:

"This section (723) though mandatory in form, was intended to preserve the trial by jury, which *may be waived.* It has never been treated by the Federal Courts as a fundamental principle of jurisdiction (Waite v. O'Neal, 72 Fed., 351), but has been treated as directory and subject to waiver. Green v. Turner, 98 Fed., 760. * * It is a *personal privilege and may be waived.*" Citing,

Wamath v. O'Daniel, 86 C. C. A., 277 (16 L. R. A. (N. S.), 414.

Foltz v. St. Louis, etc., 8 C. C. A., 635, 641.

Less v. English, 29 C. C. A., 275.

International, etc. v. Norwich, etc., 17 C. C. A., 608.

When respondents answered, they *waived* any irregularities, in previous proceedings.

Huntington v. Laidley, 79 Fed., 865.

Bryant Bros. Co. v. Robinson, 79 C. C. A., 259, 267

Adams v. Howard, 20 Blachf., 38.

Richardson v. Green, 9 C. C. A., 565.

In Walla Walla v. Walla Walla, etc., 172, U. S., 1, it was held, on page 11, that if objection was made that the complaint was "devoid of facts showing any matter which vests jurisdiction it goes rather to the *sufficiency of the pleading than the jurisdiction of the court.* Even

if this objection had been sustained the *difficulty* could have been *easily obviated by amendment.*"

In this case, the demurrer to the bill was overruled, so there was no occasion for amendment before the answer came in. If the "plea" (?) was sufficient to raise the same question there was no occasion to amend until the questions presented by the "plea" were passed upon, which never occurred, hence, it was exceedingly unjust to condemn the bill for a defect, if any, which could have been cured if passed upon adversely by the trial court. Instead thereof the trial court had, on demurrer, approved the bill. That was a judgment from which respondents could have appealed, but they omitted to do so; until the trial court *again* passed upon that question, it was *res adjudicata.* Complainant had no occasion to amend its bill after demurrer, because the court had adjudged the bill to be good. There was no occasion to amend after filing the "plea," because the "plea" was never passed upon. On the record of the trial court, the bill stands *adjudged* sufficient. That judgment cannot be reviewed on *our* appeal. By failing to get the decision of the question on the "plea," it was certainly waived, if not waived by filing the answer.

(c) *As to coming too late.*

In Gates v. Bucki, 4 C. C. A., 116 (8th Circuit) one defendant filed a plea questioning the equity jurisdiction of the court and after the case was decided on the *merits* against that *defendant,* he appealed. The court said:

"The plea filed by appellant in the Circuit Court made this question of jurisdiction *an issue* in the case, but it does *not* appear that it has *yet been passed* upon by that court.

* * * It certainly does *not appear that the Cir-*

cuit Court has as yet passed upon the jurisdiction question presented by the pleas filed by the defendant Gates. If the plea of jurisdiction should be *overruled* (by the Circuit Court) then the case must proceed to a final decree *on the merits* before any appeal can be taken on the jurisdictional question, it being then open to the *defendant* Gates to go to the Supreme Court on the same question of jurisdiction, or to bring the entire case before this court."

In that case the question of jurisdiction was first raised by *plea* and it is held that if the respondent's plea as to jurisdiction had been overruled, they, the respondents, *the defeated party*, could have taken the case directly to the Supreme Court on the question of jurisdiction, or they could have proceeded to a hearing on the merits and if again defeated, they could have revived the question of jurisdiction by an appeal of the whole case to the Circuit Court of Appeals.

4. This is complainant's appeal, *not* that of respondents, who are not here complaining of any action of the trial court. The court's decision on the *merits* was *for* them. If *they* are satisfied with the decision, why should this *court*, on *complainant's* appeal, seek out reasons to show that the trial court had no jurisdiction to make such decision.

5. The respondents are here urging the affirmance of the decree. If the court had jurisdiction to enter a decree on the merits, *for* respondents, it had jurisdiction to enter a decree *against* them. It would hardly be consistent for them to say, that, if the court finds *for us*, it has jurisdiction, but if it finds *against* us, it has no jurisdiction. That would be a very convenient court for the respondents.

Allegation of Fraud, Accident or Mistake.

Fraud, accident and mistake are acknowledged grounds of equity jurisdiction, hence if the bill contains averments showing fraud, accident or mistake it is sufficient.

Returning to the bill, we find that, in two particulars, fraud, accident or mistake is alleged.

(1). In the omission to give the *notice* required by statute.

(2). In *adding* to the complainant's assessment $62,500 worth of property *not in Colorado*.

While the bill alleges *no legal conclusions* or the pleader's opinions, as to fraud, accident or mistake, the bill alleges *facts*, which, in this connection, must be taken as true, showing either fraud, accident or mistake.

1. The statutory *notice* of the change in the assessment is the *foundation* of the right to make the change. The notice is *jurisdictional* and under the statute is essential to "due process of law." This the assessor knew. *He* was familiar with the statute that defines his duties. Hence, the omission was either (1) *intentional*, which was a fraud on complainant, or (2) a *misconstruction* of the law, which was mistake, or (3) the result of forgetfulness, *oversight* or neglect, which was accident. The facts are alleged from which these legal conclusions must necessarily follow.

2. As to the change in the assessment. The assessor knew that the complainant had returned under oath a valuation of $3,800.00 on merchandise and furniture. He made an *addition* of $62,500.00 on property, which the bill avers, the two highest appellate tribunals in Colorado had decided was property *outside*

of the state. He *added* to the assessment $60,000 worth of property which, if he knew anything at all concerning the matter, he knew was money, notes and credits, arising in nine different states and territories from business done therein, and which was *passing through* the company's Denver office to its ultimate destination beyond the limits of the state. He knew that the company had not returned that property for taxation, which could not have been oversight, because the amount was too large to be overlooked, hence its omission by the company, if the property was taxable, was either a *misconstruction* of the law, or an attempt to *evade* it, whichever view is adopted the assessor intended to subject that large amount of property to taxation without the company's knowledge until the opportunity for redress under the statute had passed by.

If prompted by a wrongful intent it was *fraud;* otherwise it was a *mistake* or *accident.* Hence, there are in the bill "averments planting complainant's rights to relief on" several heads "of equity jurisdiction," besides the averments relating to "inadequacy of legal remedy."

In this connection we cannot refrain from quoting the forceful language of Judge Sanborn, in the dissenting opinion in this case, as found in 179 Fed., on p. 635.

"In the Colorado scheme of taxation the *notice* of the increase of the assessment required by Sec. 5639 was the *process* upon which the *whole proceeding was founded.* It was the *Summons* to the complainant to appear to answer the claim of the county that its taxable property was $62,500 more than it had testified that it was. But this *Summons was never served,* this notice was never given to the complainant, and a *judg-*

ment by default was rendered against it that its assessment was $62,500 more than it actually was, and that it should pay an *unconscionable* tax upon this *illegal* increase. *Why was this notice not given?* If the assessor *intentionally* withheld it, and *knowingly* confirmed and sent forward the assessment without giving the notice, he *perpetrated* a *gross fraud,* upon the complainant. If he did not knowingly or intentionally withhold the notice, or fail to give it, he did so by *mistake or accident.*. In either case he brought this case well within the domain of a court of Chancery.

"Fraud, accident or mistake are three great heads of equity jurisprudence, and, whenever injustice or wrong, irremediable at law, is about to result from either, the power is vested in, and the duty is imposed upon the courts of equity to prevent the threatened injury. Their jurisdiction rests upon the fact that, unless they act, wrong will be perpetrated which cannot be remedied."

Under the facts alleged, the conclusion is irresistable that acts of the assessor were prompted by fraud, or the result of accident or mistake.

The majority opinion makes a generous quotation from the opinion by Sanborn, J., in Atchison, T. & S. F. Ry. Co. v. Sullivan, 97 C. C. A., 1 (173 Fed., 456, 470) from which we cut out the following:

"*Fraud* and *mistake* are ancient heads of equity jurisdiction. The Board of Equalization made a *plain mistake* demonstrable by the *mere division* of the corporate plant of the company in the state by the number of miles of railroad. * * The systematic and intentional omission of watches, clocks and jewelry, credits and fat stock by the county assessor, from the assessment of the property within his jurisdiction, *however innocent in his actual intention,* was either an *intentional fraud* upon the complainant or such a gross *mistake* that it was *fraud* in law."

The majority *opinion* here, says: "We have no occasion or disposition to criticise the doctrine of that case." So it may be accepted as good law. Why is it not applicable here? In that case, facts were alleged showing fraud in the method pursued. It is the same here. Facts are alleged which show fraud, accident or mistake.

As to whether the bill invokes the jurisdiction of a court of equity, we will further inquire of the bill, the allegations of which, for this purpose, must be taken as true. For brevity, we will condense, giving the substance of the averments applicable to this question.

The bill alleges the return made by the company of "moneys and credits invested in merchandise and manufactures" at $3,500; "furniture and fixtures," $300, total $3,800; "*which covered all the property of the* ***plaintiff within*** **the City and County of Denver.**"

The bill quotes the statute providing that "the assessor SHALL prior to the first Tuesday in August of each year, mail to each person * * a statement of *any change* in valuation, etc." That the assessor *added* to complainant's assessment $60,000 on "all promissory notes, bonds, debentures **and other written evidences of in**debtedness, book accounts, bank stock, deposits in Colorado banks, deposits in banks outside of Colorado," and $2,500 "on all other property," in all $62,500. "That the plaintiff at that time, or any time previous thereto, *did not* have in the State of Colorado, any personal property comprehended in said schedule" as changed by the assessor; alleges that the said statutory notice was not given; "that the business of said company is **the sale of sewing machines,** purchased and sent from the states of New Jersey and Indiana for sale in the

states of South Dakota, Montana, Idaho, Utah, Wyoming, Nebraska, Colorado and Texas and the Territories of New Mexico and Arizona," that the proceeds of such sales are *transmitted* to the principal office of the company, in New York, *through* its office in the City and County of Denver.

"That the said assessor intended to assess, and thereby tax, the said money, notes, and other obligations, passing through the company's general agency at Denver," on its way to New York.

"That the treasurer now *threatens* * * to collect said unpaid taxes * * *by the seizure of the plaintiff's personal property* and *sale* of the same at public auction." That under the decisions of the Supreme Court of Colorado, it had been "held that *notes and credits owned by non-residents of Colorado were not taxable within the state.*"

From these allegations it appears that the assessor *intended* to tax property of the company *not within* the state, but property *in transit* from different states on its way through Denver to New York; that the assessor did not give the statutory notice; that the State Supreme Court had held that such property was outside the State and not taxable, of which the law presumes the assessor had knowledge; hence, it appears *from the bill*, that the assessor *intended* to assess property *outside* the state, which he knew was not taxable, and this, *without the knowledge* of the company. *That was fraud.* If he was innocent in his intentions, then it was accident or mistake. Whether fraud, accident or mistake, is immaterial for the purpose of the consideration now before us. Under either head the jurisdiction of equity is invoked.

If these conclusions are correct, then this case comes within the doctrine of Atchison, T. & S. F. Ry.

Co. v. Sullivan (*supra*), as found in the excerpt taken from the majority opinion in 179 Fed., 634.

As Viewed in Colorado.

The Supreme Court of Colorado had this statute before it in Gale v. Statler Co. Treas., 47 Colo., 72, 77, where the *notice* of a change made by the assessor, exactly as in this case, was *not given* the tax payer, and it was held that the change in the assessment without the notice and the tax based thereon, were *absolutely void*, and that INJUNCTION WAS THE PROPER and only ADEQUATE REMEDY to prevent the collection of the tax. The same conclusion was reached by the Montana Supreme Court in Cobban v. Monger, 113 Pac., 290, 293, distinguishing the remedy where the tax was *void* from one *merely* illegal or irregular.

Injunction. In Fargo v. Hart, 193 U. S. 490, this Court said:

"If there was *no right* to assess the particular thing at all,—an assessment made under such circumstances would be VOID. No tender would be necessary before seeking an injunction."

Colo. F. & L. S. Co. v. Beerbohm, 43 Colo., 464, 481.

That injunction is the proper remedy, see also, *ex parte* Young, 209 U. S., 123.

Ludwig v. Western Union, etc., 216 U. S., 146, 164.

Western Union, etc. v. Anderson, 216 U. S., 165.

In this connection we may again refer to the majority opinion, where it is said:

"The law is well settled that, unless a complainant

can invoke some recognized head of equity jurisdiction, the *mere illegality* or *irregularity* of a tax, complained of, gives no right to injunctive relief against its collection."

That is not this case, because, as we have seen and as will be further shown, we have invoked several recognized heads of equity jurisdiction, and because this is not a case of "the MERE *illegality* or *irregularity* of a tax," but one where, as held by the highest tribunal of Colorado in construing this very law (by which the Federal Courts are bound) such *tax is absolutely void.* For that reason alone, the Colorado Supreme Court held that injunction was the remedy, although the same Court, in several cases, had previously held that injunction would not lie for a *"mere illegality or irregularity in the tax."*

Again we quote from the majority opinion, p. 632:

"It is said the assessment of the *complainant's property* by the assessor at a *valuation above* that returned by it, was an adjudication of the legality of the tax and *unassailable* except by some proceeding like the present bill."

That is hardly a correct statement of our position, because (1) The *"Complainant's* property" was not assessed, (2) It was not "at a *valuation above* that returned by the Company," since the Company returned neither such "property" nor any "valuation" thereon. The tax is on property located in New Jersey; added to the assessment, not a change made by over-valuation, but the statement is correct in saying that we contend that the decision of the assessor "was an *adjudication* of the legality of the tax and *unassailable* except by some proceeding like the present bill," as we shall show when we come to consider the adequacy of legal proceedings.

Adequacy of Legal Remedy.

If we understand the majority opinion, it is held that the complainants had as full, adequate, prompt, speedy and complete a remedy at law as in equity, and bases its conclusions on the following grounds:

1. The assessor in making the addition to the assessment acted in the capacity of a *special tribunal*, whose judgment by reason of failure to give the statutory notice, was *void;* and, being void, could be attacked at any time *collaterally*.

2. If the county treasurer should seek to collect the tax by *distress*, it is not shown that the company had any personal property in Denver, therefore it does not appear that the company could thereby be embarrassed.

3. The seizure of personal property by the treasurer would amount to *trespass* for which the injured party would have sufficient redress in an action at law.

4. The statute provides for the collection of the tax by an ordinary suit. (Sec. 5677.) In such a suit, "complainant would have had adequate remedy at law to make *any defense* based upon the *illegality* of the tax."

We will consider these propositions in their order.

1. Can a judgment, or decision, of a special tribunal, such as the assessor here, *void* because entered without jurisdiction *in personam*, be attacked collaterally?

Bear in mind that the statute gave the assessor, as a special or *quasi tribunal*, full power and authority to make the decision, provided the proper *notice* had been given. It does not appear that the law required the as-

sessor to keep any record, or proof of giving his notices, nor does it appear as a fact that such a record was kept, hence, the presumption would obtain in any *collateral* proceeding that the notice was sent *by mail* as required by the statute. The assessor entered the decision against the complainant which he could not legally enter without giving the notice, therefore it would be presumed the notice was given.

In Hobson v. Dutton, 9 Kas., 477, the court, per Brewer, J., announced the correct rule in regard to official acts as follows:

"In cases where no written or record evidence is required to be kept, an official act which can be rightfully done only after some precedent act by the same officer, is, itself, *presumptive evidence* of the performance of the said precedent act."

The Supreme Court of Ohio in Ward v. Barrows, 2 Ohio St., 241, says:

"The law *will presume* all to have been *rightly* done, unless the circumstances of the case overcome the presumption; and consequently, as stated by the Supreme Court of the United States, in Bank v. Dandredge, 12 Wheaton, 'Acts done which *presuppose the existence of other acts* to make them legally operative, are *presumptive proof* of the latter.' * * *Facts presumed are as effectually established as facts proved.*"

Cited, approved and followed in Comb v. Lowe, 4 Oh. St., 112.

In Hartwell v. Root, 19 John, 344, it is said:

"Where an officer is required to do a certain act, the omission of which would make him guilty of culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown."

The author of Abbott on Trial Evidence on p. 199, says:

"An officer, when acting under the sanction of an oath, or in whom government reposes trust, is presumed to have done his duty until the contrary be proved."

In State v. Howard, 10 Ia., 101, on p. 103, the Court said:

"No record is required to be kept of the drawing of the jurors by the clerk, and in the absence of any showing to the contrary, the officers charged with that duty will be presumed to have followed the directions of the statute."

In Tecumseh Townsite Case, 3 Neb., 267, on page 284, the Court said:

"The law will presume the official acts of public officers to have been rightly done, unless the circumstances of the case overturn the presumption; and acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter."

Such being the law in regard to the presumption of notice, we will see what the courts hold as to judgments based thereon.

In Trowbridge v. Allen, 48 Colo., 419, the court, per Gabbert, J., on page 421, said:

"When a judgment is rendered by a district court, it will be *conclusively* presumed that all steps necessary to give the court jurisdiction of the parties against whom such judgment was pronounced, were taken, unless it *affirmatively appears from the record* that they were not."

Citing numerous decisions of Colorado and 1 Black on Judgments, sections 270 and 271.

The Federal Supreme Court applied this doctrine, where a board of revision (instead of assessor), made the assessment in Stanley v. Supervisors of Albany, 121 U. S., 535, 550, in which case the court said:

"To these boards of revision, by whatever name

they may be called, the *citizen* must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is *judicial* in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are *not open to collateral attack*. If not corrected by some of the modes pointed out by statute, they are *conclusive*, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment *cannot be recovered back* in an *action at law*, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed."

This ought to settle the law.

This case was cited, approved and followed in

M'Leod v. Receiver, 71 Fed., 457, 458, where the Court said:

"It is, no doubt, true, as urged by the counsel for the appellants, that a judgment pronounced by a tribunal having no authority to determine a matter in issue is necessarily and incurably void, and that such want of jurisdiction may be shown in any collateral or other proceeding in which it is shown in question. That principle, however, has no proper relation to the case in hand, because it is undenied and undeniable that the *board of equalization had the power to assess*, and the state of Indiana and the county of Floyd had lawful right to tax, the property of the bridge company lying *within the county* of Floyd. The officers of the board of equalization, in estimating the value of property for taxation, *act judicially*. Their judgment in cases *within* their jurisdiction, in the absence of fraud, are *not open to collateral attack*. They can only be impeached in a direct proceeding. Stanley v. Supervisors, 121 U. S., 535, 550, 7 Sup. Ct., 1234. This *immunity from collateral attack* is applied not merely to courts of in-

ferior jurisdiction, but to the numerous *special tribunals* through which the authority of the state is exercised."

Van Waganen v. Carpenter, 27 Colo., 444, had under consideration another action commenced by attachment under special statute, where it did *not affirmatively* appear that the steps necessary to confer jurisdiction had been taken, and, after citing several cases, the court, said, page 453:

"Our conclusion upon this question recognizes, as applicable to judgments in this class of cases, the same presumption of jurisdiction, upon *collateral attacks*, that obtains in other cases, to-wit: That everything necessary to be done was done *unless the contrary appears from the record.*"

The doctrine announced in Van Waganen v. Carpenter (*supra*), was adopted and followed by the Colorado Supreme Court in Burris v. Craig, 34 Colo., 303.

In Farmers' Union D. Co. v. Rio Grande Co., 37 Colo., 512, there was a judgment of the district court, acting as a *special tribunal*, under a statute conferring jurisdiction to adjudicate water rights, but it *did not appear* that a certain notice required by the statute to be published in a newspaper had been so published prior to the decision of the water rights. Upon this point the court, page 519, said:

"So that, although no affidavit of posting and publishing in the county of Hinsdale *was found in the files*, the *conclusive* presumption attaches upon a *collateral attack*, unless the *record affirmatively exhibits the contrary*, that everything necessary to be done was done, in order to invest the court with jurisdiction to adjudicate the water rights of district No. 20, by the proceedings for that purpose instituted in 1889."

Citing Freeman on Judgments, Section 124, and Newcomb's Executors v. Newcomb, 13 Bush, 544 (26 Am. St. Rep., 222) and several Colorado cases.

In the Newcomb case, after a long discussion of various authorities, the court, in conclusion, said:

"It is a well settled rule, so far as scarcely to be questioned, that a domestic judgment rendered by a **court of general jurisdiction cannot** be *collaterally attacked*, unless the want of jurisdiction *appears upon the record.*"

And later in the opinion the same court, still considering the affidavit upon which the jurisdiction was founded, said:

"For the reasons given we cannot concur with the court below that the *absence of the affidavit* from the record renders the judgment void. The presumption is that the warning order was entered by the court as required by the code."

In the dissenting opinion of Judge Sanborn in this case at bar, to whose powerful argument, found on pp. 634-639 of Vol. 179, Federal Reports, the Court is respectfully referred, are cited several cases bearing on this question. For sake of brevity we will refrain from copying the excerpts made by the dissenting judge and simply refer to them by their titles, viz:

Colton v. Beardsley, 38 Barb., 29.

In re Sawyer, 124 U. S., 200, 220, 221.

Des Moines, etc. v. Iowa Homestead Co., 123 U. S., 552, 559.

Rogers v. Penobscot, etc., 83 C. C. A., 380.

Foltz v. St. Louis, etc., 8 C. C. A., 635, 637.

Natl. Surety Co. v. State Bank, 56 C. C. A., 657.

The assessor in this case, as conceded by both the majority and minority opinions, acted as a *quasi* or *special* tribunal.

Meacham Pub. Officer, Sec. 637.

Throop on Pub. Officers, Sects. 533, 534.

Flournog v. Jeffersonville, 17 Ind., 169.
U. S. v. California, etc., 148 U. S., 31.
Sinking Fund Cases, 99 U. S., 700.

Throop in Public Officers, Sect. 552, says:

"As a general rule, judicial and *quasi* judicial acts are *conclusive*, except when a method of reviewing the same is given by statute, and then they are *conclusive for* every purpose, *except* for the purpose of such review."

In Colton v. Beardsley, 38 Barb., 29, 31, the Court said:

"It is of the essence and nature of *such acts*, whether the power to perform them is committed to a court, or a body of men, or to an *individual*, that they are *final* and *conclusive*, except in a *direct proceeding* instituted for their *reversal*, and that they cannot be *inquired into or questioned collaterally*."

In harmony with these citations and quotations is the argument of the minority opinion in this case in the Court of Appeals, and as the same is pertinent here we will make an extended extract therefrom and adopt the same as a part of this argument, as follows:

"The assessor had jurisdiction upon proper notice to the complainant, of the subject matter and of the party to this tax proceeding. He was invested with the power and it was his duty, to ascertain and *determine* whether or not the jurisdictional notice had been served on the complainant, and if it *had* been, to *confirm* the assessment of its property and send it forward for the levy. The *assessment roll and the warrant* formed the record of his adjudication of this issue, and it seems to me, that they and that judgment, which they evidence, are *impervious to collateral attack* under the authorities which have been cited, and that they can be avoided or restrained in a Federal Court only by a plenary suit like that in hand, upon the ground of fraud, mistake or other like basis for relief in equity.

In my opinion the roll and the warrant, until avoided or restrained in equity, constitute a perfect justification of a distraint by the treasurer—a complete answer to an action of trespass in a Federal Court for such distraint, incontrovertible proof of a cause of action to recover the tax in such a court *where equitable defenses are not available* in actions at law, and the complainant has no adequate remedy at law for the threatened collection of the unjust tax."

Penoyer v. Neff, 95 U. S., 714, 721, cited by the majority opinion, as shown by Judge Sanborn in the minority opinion (p. 637) supports these views and clearly draws the distinction between a case open to collateral attack, and one not so open.

The very fact that distinguished judges, of great ability and learning, differ on this question, and support their conclusions by strong arguments, shows of itself that the complainant has not a *plain, speedy,* complete and adequate remedy at law.

2. Does it appear from bill or the record, that the complainant has in Denver, any personal property subject to distraint by the treasurer in collecting this tax?

It is a familiar principle of evidence that what is once shown to exist, is *presumed to continue* to exist for a reasonable time, until the contrary is shown, unless such presumption is refuted by the very nature of the thing.

The company returned, under oath, for taxation, property to the amount of $3,800, sufficient to pay this tax. The assessor asserted that the company had property in Denver, in addition to the $3,800, to the amount of $62,500. For the purpose of this consideration, these must be taken as true.

If the allegations of the bill are not sufficient in

this respect, they are *aided by the Answer*, which states:

"Defendants further allege that the amount of personal property, including *moneys on hand* and deposited in banks, and notes, credits and other obligations representing money, owned by plaintiff and received from its business through its Denver general agency, aggregated during the year 1905, more than one million dollars ($1,000,000) and that the *average* amount of *personal property, money, notes* and credits, *on hand, held, kept and used* by the plaintiff company in the City and County of Denver, during the year 1905, exceeded $60,000."

The evidence of W. C. Stewart, chief clerk and bookkeeper of the company (Abst., p. 25), shows, that the average weekly deposits of the company in bank during 1905, were $24,000.

On cross-examination, Mr. Stewart testified (p. 29) that the average value of the company's stock of merchandise in the Denver store was $3,500. He testified further (p. 31) that the amount of *money* received at the Denver general office during the year ending March 31, 1905, amounted to $297,000; this was remitted to the home office, but necessarily much of it was on hand in Denver just prior to a weekly remittance, and there is no presumption that the company, while still doing business in Colorado, has discontinued making collections.

At all events it does not lie in the mouth of the respondents, after taxing the company on an assessment, of $66,300, to say, that the company did not have property amounting to $2,284.05 the amount of the tax, which the treasurer threatened to collect; and if the respondents cannot say it, it does not devolve on the court to say it for them.

3. In the event of the *seizure* of the company's

property in order to collect the void tax, would the complainant have a plain, speedy, complete and adequate remedy in a Federal Court, by an action of *trespass* or other action for damages, against the treasurer?

The majority opinion tacitly admits that an action of *replevin* would not lie, because, in Colorado, the only action for the recovery of personal property, is purely statutory, and the Code of Civil Procedure provides that the plaintiff, as the basis for such action, must file in court an affidavit stating, among other things, that the *property* sought to be recovered *was not seized for taxes;* therefore an action for the recovery of the specific property was not open to the complainant. Such an action being barred, the majority opinion says the company would have an *action for damages* against the treasurer in trespass.

Is that correct?

Would not the treasurer, if sued for damages in an action at law, justify under his warrant? Would not the warrant, like an execution in the hands of a sheriff, be a complete defense to such an action?

We have a case in Stutsman County v. Wallace, 142 U. S., 293, similar to the one at bar, which came to the Federal Supreme Court from the Supreme Court of Dakota Territory, where a *territorial assessor* had decided upon the question of exempt property and made an assessment accordingly. It was contended that his decision was wrong. But the court, per Fuller, C. J., on page 310, said:

"Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, and although the assessor may have been *without jurisdiction* over the particular property, yet as he had general jurisdiction to list property for taxation, and there

is no pretence that there was anything on the *face of the warrant* to apprise the treasurer of the lack of jurisdiction, *he* cannot be held, in executing the warrant, as guilty of a *wrongful act* within the intent and meaning of this statute."

In Erskine v. Hohnbach, 14 Wall, 613, Hohnbach sued Erskine, a collector of Internal Revenue, in an action of trespass for the seizure of personal property to satisfy an Internal Revenue assessment. The tax was certified to him by the assessor of the district directing its collection. The defendant Erskine, as collector, answered justifying under the assessor's warrant.

The court, per Field, J., said:

"The assessment, duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the *subject-matter,* constituted his protection.

"If the officer or tribunal possess *jurisdiction over the subject-matter* upon which judgment is passed, with power to issue an order, or process, for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is *regular on its face,* showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give *full and entire protection* to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although *serious errors* may have been committed by the *officer or tribunal* in reaching the conclusion or judgment upon which the order or process is issued."

In Haffin v. Mason, 15 Wall., 671, the assessor raised the assessment *"without giving to the distillers any notice of the increased enumeration,* or of his action, and so without giving them any opportunity to be heard." A new list was duly certified to Mason, the collector, who after making demand for the money *dis-*

trained property of the distillers. Thereupon the distiller, Haffin, brought an *action of trespass* against Mason, the collector.

The court, per Davis, J. (page 675), said:

"The assessment in this case, duly certified by Hyatt, the assessor, was received in evidence, without objection, and no point was raised as to its form or sufficiency. If, then, the assessor had the right to decide the question, whether the plaintiffs were liable to the increased taxation, the list delivered by him to the collector, properly certified, was his *warrant* to seize and sell the property in case the taxes were not paid, after he had made demand for them.

It was not the *business of the collector* to *inquire* into the case to ascertain whether the assessor had reached a proper conclusion upon the matter submitted to his judgment, nor had he any right to *refuse to enforce the assessment.*"

In Harding v. Woodcock, 137 U. S., 43, an action was brought against a distiller and the sureties on his bond, to recover the balance of taxes assessed, and judgment was recovered. The distiller brought an action for damages for seizure and sale of his property, one count in the nature of trover and the other in the nature of trespass. The court, on page 46, per Field, said:

"When the assessment was certified to the collector, his duty in enforcing it was one which he *could not refuse to perform.* There was no discretion vested in him to revise or alter it in any respect. His duty was purely ministerial. In Erskine v. Hohnbach, 14 Wall., 613, 616, which, like the present action, was brought against a collector of internal revenue for the seizure and sale of property of the plaintiff upon an assessment for taxes duly made by the assessor of the district, the court held that the assessment, certified to him (the collector) was his *authority to proceed,* and, like an exe-

cution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, *constituted his protection.*"

In Games v. Robb, 8 Iowa, 193, we find an action of trespass against the County Treasurer for taking personal property for the amount of taxes under list and warrant, issued to him for that purpose. The Court, per Wright, C. J., on page 197, said:

"This list is required to be delivered to the treasurer, and it is a full and sufficient authority for him to collect all taxes therein contained. Upon receiving this list and warrant, the treasurer is to proceed to collect the taxes levied, and the list and warrant are his authority and *justification* against any *illegality in the proceedings, prior* to receiving the list."

And again on page 201, the court said:

"It will be observed that this suit is brought to make the treasurer liable, not for any act or omission of his (so far as the demurrer reaches), but for the acts or omissions of others. The law has declared explicitly that the tax list and warrant, shall be his *authority* and *justification* against any illegality in the proceedings, prior to his receiving the list, and that the tax list alone, will be a sufficient warrant for such distress."

In Bird v. Perkins, 33 Mich., 28, an action of trover was brought to recover the value of a horse taken and sold by defendant, as village marshal, for taxes levied by the village board. It was contended that the tax was illegal and that the warrant was not fair on its face. Many objections were urged to the warrant itself. The Court, on page 31, per Cooley, J., said:

"These objections not being well taken, we think defendant had process which was fair on its face. We also think this was sufficient to protect him *against any illegalities* except his own." Citing cases from Maine, New York, Missouri, Massachusetts, Louisiana,

New Hampshire, Pennsylvania, Illinois, Ohio, Connecticut, Wisconsin, Indiana, Michigan, North Carolina and the United States Supreme Court.

In 37 Cyc., 1211, under the heading of "Taxation" an article prepared by Henry C. Black, the eminent writer on ***Taxation,*** we find the following:

"By the weight of authority, a collector of taxes, who acts under the authority of a warrant or other process, which is duly issued and regular, and sufficient on its face, is protected thereby against everything except his own fault or illegal conduct; and neither an ***illegality*** in the tax itself, nor defects in the *levy* or assessment ***will expose him to liability*** as a trespasser."

Citing cases from Alabama, Georgia, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississipi, Missouri, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Wisconsin and the Federal Courts.

In Nowell v. Tripp, 61 Me., 426, the Court said:

"Walton, J. It is the settled law of this state that a collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from the assesssors, is protected against all illegalities but his own. Judkins v. Reed, 48 Me., 386; Caldwell v. Hawkins, 40 Id., 526; Ford v. Clough, 8 Id., 342."

If these high authorities announce the correct law, then the majority opinion was wrong in announcing the doctrine that the complainants would have an action of trespass against the treasurer for wrongful seizure of the company's property in order to collect the tax.

In the event of such *seizure,* if neither replevin nor trespass would lie, then the complainant would be destitute of any remedy. Where then would be the "plain, speedy, complete and adequate remedy at law?"

4. In the event of *suit* under the statute against

the complainant by the treasurer to collect the tax, would the complainant, in the language of the opinion, "HAVE ADEQUATE REMEDY AT LAW to make *any defense* based upon the *illegality* of the tax?"

If yea, then the treasurer would bring no such action. Why should he commence such a suit? If successful, the result would be a judgment against the complainant for the amount of the tax, and, if not paid, an execution would issue to *seize* the complainant's property. There is already a *judgment* entered up by the assessor. The treasurer's warrant and list is the *execution*, under which the treasurer could seize any property of the company found in his county.

If such an action should be commenced, would not the treasurer *prove his case* by introducing the *tax warrant* and list regular on their face, sent forward to him by the assessor? In such action in Colorado, the warrant would be impervious to collateral attack. If the citations hereinbefore made from State and Federal Courts are good law, then in such an action *at law* in a Federal Court, where no equitable defenses are available, the warrant and list could not be *collaterally* attacked. In such an event the complainant would then be compelled to resort to equity, in a suit like this, to restrain the proceedings of the law court.

Another reason why the county treasurer will never bring an action of law against this complainant, is, that the tax on this personal property, if valid and collectable by *distress* of the company's personal property, is not a personal claim, charge or debt against the *company*, but against the property, on which it is a *perpetual* lien.

Judge Cooley, in Cooley on Taxation, 2d Ed., p. 371, says:

"When a *non-resident* is owner of tangible prop-

erty within the state, and the state imposes taxes upon it, the tax is not a charge against the owner *personally*, but must be enforced *against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents;* neither can *the personality of a non-resident be taxed unless it has an actual situs* within the state, so as to be under the protection of its laws."

Consequently, in this case, as the assessor gave no notice of the assessment, he acquired no jurisdiction *in personam* over the company, his decision and the warrant issued thereon can be no personal charge against the company, but only against the company's personal property found within the jurisdiction, on which the statute says it shall be a perpetual lien. Hence no personal suit would lie.

The Volition of Opposing Party.

There is one more potent reason, not mentioned by the majority opinion, why *this action* should be maintained.

A remedy at law is not adequate if it depends on the *will* of the opposing party. The complainant is not compelled to await the pleasure of the city and county, as to when, where or how it may institute proceedings to enforce the collection of this tax. The tax of 1905 is under the Colorado statutes made a *perpetual lien* on any and all personal property of the complainant in the City of Denver; like the sword of Damocles it continually hangs over the head of the company, ready to fall. The tax may be enforced against the company's property wherever found. The moment a carload of machines crosses the city limits the octopus of that lien grasps and holds each machine. All the sewing ma-

chines sold in Denver since the tax was levied, as well as all stock in the store or warehouse is burdened with its lien, if valid. Such a lien is a continual annoyance and embarrassment to the company. Must complainant *wait* indefinitely the will of the city and county? Must it continually endure the uncertainty, dependent on the pleasure of the opposing party?

The complainant is entitled to a *prompt* and *speedy* remedy. It has a right to have this lien cancelled and its property relieved, and no other remedy is as efficient and adequate as a suit in equity.

Schmidt v. West, 104 Fed., 272, 274.
Mutual Life, etc., v. Pearson, 114 Fed., 397.
United States, etc., v. Cable, 39 C. C. A., 264.
Bank of Kentucky v. Stone, 88 Fed., 383, 391.
Union L. I. Co. v. Riggs, 123 Fed., 317.

In this connection, do not forget that this tax was levied in Colorado, where every step to enforce its collection must be made under its laws and subject to its rules of procedure. The rule is judicially settled in that state, that, in a collateral attack, the court rendering a judgment is *conclusively presumed* to have had jurisdiction, unless it *affirmatively* appears from the *record* that the court did not have jurisdiction.

Hughes v. Webster (Colo.), 122 Pac., 789.
Trowbridge v. Allen, 48 Colo., 419.

This is so where the court is acting as a special tribunal.

Farmers, etc., v. Rio Grande, etc., 37 Colo., 515.
Van Wagenen v. Carpenter, 27 Colo., 444.

Such being the estblished doctrine, it follows that, in any proceeding in which the decision and warrant of the county assessor would be relied on as the basis of

proceedings it would be conclusively presumed that the county assessor had given notice to the Singer Company required by law, unless *his record* showed affirmatively to the contrary. As the statute does not require him to keep a record, the lack of jurisdiction could not be shown in a collateral proceeding.

While we might in some proceeding contend collaterally that the decision of the assessor is a judgment *in rem* only, and not a lien on other property than the specific property against which it is assessed, still we are confronted with the Colorado statute, which says it is a *perpetual lien* on *all* personal property of the taxpayer. We must face that statute or convince the Court that, as against this company, the law is unconstitutional. Whatever proceeding the treasurer might institute to carry into execution his *threat* to enforce the collection of the tax the treasurer would adopt such a proceeding as, in the judgment of learned counsel, lay the assessor's proceeding least open to collateral attack. If one proceeding would afford us an opportunity for collateral attack and another would not, then it cannot be said that we have at law as full, adequate and complete a remedy at law as we have in equity. Otherwise we would not merely await the *will* of the authorities as to the *manner* they would proceed against us, but await with the conviction that they would find a method where we could not show the invalidity of the assessment; by which we would be denied an adequate remedy at law.

Due Process of Law.

Under both the national and state constitutions complainants are, before its property is taken for pub-

lic purposes, entitled to "*due process of law.*" In both the majority and minority opinions, it is conceded that, in the assessing of the tax on $62,500 worth of property—a tax amounting to over $2,100—the law of Colorado was not observed. The taking of property by the public authorities, without giving an opportunity to be heard, is usurpation, nor a mere irregularity. The power to take $2,100 in that way involves the power to take $21,000 or any other sum. To prevent such usurpation there is no other court but a court of equity which can afford prompt, speedy, complete and adequate remedy.

In conclusion, we will quote the true rule as laid down in Wylie v. Coxe, 15 Wall, 415, 420, where the Court said:

"It is objected that equity can exercise no jurisdiction in this case, as *adequate* relief may be obtained at law. There *may* be a *legal* remedy, and yet, if a *more complete remedy* can be had in chancery, it is a *sufficient* ground for jurisdiction."

Walla Walla v. Walla Walla, etc., 172 U. S., 1, 12.

Insurance Co. v. Bailey, 13 Wall, 616, 621.

Kilbourne v. Sunderland, 130 U. S., 505, 514.

Tyler v. Savage, 143 U. S., 79, 95.

When it is shown that, in the event of the seizure of the company's property by the treasurer, there is no remedy by replevin, or in an action for *damages;* or, in the event of suit for the tax, there is no *defense at law,* or where there is a *perpetual lien* hanging over the company's property, there is no legal relief from the continuous lien, who will say that equity does not afford a more complete, prompt and speedy remedy than an action at law?

ARGUMENT ON MERITS.

The complainant is entitled to relief because the attempted tax is contrary to the Federal Constitution:

1. Because an attempt to take private property for public use *without due process of law*, in this, (a) the addition to the assessment was made and the warrant forwarded to the assessor without giving the statutory notice required to give the assessor *jurisdiction* to confirm the assessment; (b) the attempted *additional* assessment and tax was made on property *not within the state*, and not subject to taxation in Denver.

2. The assessment and tax were an attempt to tax *interstate commerce*.

3. The attempted assessment and tax is contrary to that part of the XIV Amendment to the Constitution of the United States, giving equal protection of the laws.

1. *As to due process of law.*

(a) We have already sufficiently discussed the question of attempting to *add* to the complainant's assessment *without giving the statutory notice*, a part of the "due process of law" outlined in the Colorado Revenue Act, whereby the taxpayer may be *heard* before the assessor and the District or County Courts, and as the "due process of law" is not otherwise provided for, then, without notice, the complainant was deprived of "due process of law" as we have hereinbefore shown.

(b) The assessor attempted to make an assessment and cause to be taxed, property *not* within the state of Colorado.

There are certain elementary and fundamental principles, which we may invoke in this connection, recog-

nized by all the authorities in exercising the power of taxation.

1. While the power to tax is inherent in all our state governments, the authority of any particular *officer*, or board, to assess, or tax, must be *expressly* conferred by statute.

Davenport v. M. & M. Co., 12 Iowa, 539, 545.

2. The power to assess, or tax, must be derived from the legislature which represents the people, as "taxation without representation" is usurpation and tyranny.

3. The *legislature* reserves *to the people* all power relating to taxation not expressly delegated to some officer or board and what is necessarily implied in the authority expressly conferred in order to execute the powers delegated.

Hathaway v. Choury, 14 Colo. App., 478.

4. The right to tax is measured by the protection given.

These principles are elementary. While the assessor is a constitutional officer, the constitution in this respect is not self-executing; he is powerless to act until the legislature defines his authority.

"The power of taxation * * * is a legislative power, and when the people, by their constitutions, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of the more general power." 1 Cooley on Taxation, 2d Ed., pp. 7, 9.

These being unquestioned rules, let us inquire what powers in this respect the Colorado legislature conferred by the revenue act of 1902, in force in 1905.

Part of section 13 of the revenue act. "The term 'credit' shall include every claim and demand for money, labor or other valuable thing, etc."

SEC. 15. "All property not *expressly exempt* by law shall be subject to taxation. The term 'property,' as used herein, shall be held to include both tangible and intangible property."

SEC. 16. "The *moneys* of non-residents, *kept and used, loaned and invested within the state for profit,* shall be subject to taxation in like manner as the moneys, credits and effects of persons domiciled within the state."

SEC. 78. "Except as otherwise provided herein, personal property shall be listed in the *county,* where it shall be on the first day of April of the then current year."

Unless the authority to tax was conferred by these statutes, then the *additional tax* should be declared *void,* because otherwise it is taking property without "due process of law." The salient facts show a foreign corporation doing business in nine states, by means of a general agency in Denver through which the cash proceeds of the business in the several states are sent to the home office outside the states, after a delay of one to six days in the Denver office for the purpose of accounting and supervision. It is the same with the notes and contracts, except that they are so transmitted once a month, to be returned, however, in rare instances, to the *store* where they originated, for collection. During the several twelve months ending March 31, 1905, money to the amount of $297,000 thus passed through the Denver agency, none of which, in the language of the statute, was "kept and used, loaned and invested" in Denver, or in Colorado.

Under the pretense that some of this money, or the notes and contracts, had a *situs* for taxation in Denver, the assessor *added* to the "return" made by the company, $62,500. The answer substantially admits this,

and attempts to justify the tax by alleging that "the average amount of personal property, money, notes and credits on hand, held, kept and used by the plaintiff company exceeded $60,000," on which the plaintiff ought to pay tax. But unfortunately for respondents the evidence failed to substantiate any such statement. Had such credits been owed in Denver, of which there was no proof, though owned elsewhere, the rule as to taxation would have been the same, as we shall see when we come to the Colorado construction of a similar statute.

As to due process of law.

(a) Perhaps we have sufficiently shown that the "due process of law" for changing any assessment from the sum as returned by the taxpayer was based (1) on a notice to be served on the taxpayer before the first of August; (2) a hearing thereon, by the party affected, before the assessor; (3) an appeal and hearing before the District or County Courts. Without the observance of these provisions, the assessor had no jurisdiction, and his method pursued was not "due process of law," but a violation of the national constitution.

(c) *Was the property taxable?*

If the property was not taxable, even though the statute was observed in the assessor's proceedings, still it would have been taking private property for public use without "due process of law." The complainant's contention is, that neither the money nor the credits were *within the state;* nor was the "money kept and used, loaned and invested within the state" any more than money being carried through the city by an express company which, by chance, may have been detained in Denver over a day.

The company had made no attempt to escape legiti-

mate taxation. In nearly all the larger towns and cities in the nine state composing that district are located stores where Singer sewing machines are kept and sold. The stocks of merchandise in all these places are listed and returned for taxation. But after one of these machines is sold and a contract is taken therefor, the assessor seeks to compel the complainant, after being taxed on the machine in the store, to pay a tax on the proceeds while on its way through Denver to the home office. This would compel double taxation—a tax on the machine in Arizona or Utah and a tax on the proceeds in Denver. The debtor resided in Arizona or Utah. The creditor had its domicile in New Jersey. The *piece of paper*, which was merely the evidence of the credit, passed *through* the Denver office some time *during the year*. It was not detained in Denver, except temporarily for business reasons, but sent forward and was out of the state when the assessment was added. On what principle of law, logic or ethics was it taxable? After it was sent forward, the creditor, the debtor, and the paper evidence of the debt, were at the time the assessment was made, outside the state and beyond its jurisdiction, even if it was taxable there under any conditions.

The *city* would have just as good right to tax the company's sewing machines stored in Santa Fe, Butte, Chicago or San Francisco.

This Court in Buck v. Beach, 206 U. S., 392, held that promissory *notes*, given and payable in Ohio by residents of that state, to citizens of New York, were not taxable in Indiana, though physically present in that state, even if sent there to escape taxation elsewhere.

The case here is much stronger than that of Buck

v. Beach, because the notes and contracts made elsewhere, as the proceeds of business done in other places, payable where made to a citizen of New Jersey, were sent through Denver in regular course of business without being physically present in Denver, at the time the assessment was made, and there is no evidence or intimation that they were in Denver at all for the purpose of escaping taxation elsewhere.

We have called special attention to the Colorado statute which is the authority and limit in taxing non-residents. Section 16 says: "The *moneys* of non-residents, *kept and used, loaned and invested within* the state for *profit* shall be subject to taxation, etc."

This language quoted from section 16 recognizes the doctrine that *protection* and *taxation* go hand in hand; hence the Colorado legislature recognized that the officers of the state had no right to levy a tax on the moneys of non-residents, unless brought into the state, not simply in transit, nor for temporary deposit in bank, but to become a part of the mass of property *within* the state, invoking protection from the state authorities and thereby becoming bound to contribute to the support of the government which affords the protection; so it was enacted that "the moneys of non-residents, kept and used, loaned and invested *within* the state for profit shall be subject to taxation." The word "within" undoubtedly governs the words "kept," "used," "loaned" and "invested," so that the moneys must be kept *within* the state for profit. The language used in the section implies that the moneys of non-residents, in order to be taxed, must be employed in something having some degree of permanency. The words "kept," "used" and "invested" convey that idea. Moneys of non-residents,

accruing from business done in nine different states, sent through a central office at Denver, though detained from one to six days for the purposes of acccunting and supervision, are not "kept," nor "used," nor "loaned," nor "invested" "*within* the state for profit," or otherwise.

For purposes of taxation such "moneys" lack the element of permanency, contemplated by the statute, within the state essential to make it a component part of the mass of property within the state. With equal propriety the city might tax "moneys" in the pockets of tourists passing through the city, or "moneys" in the hands of express companies in transit, even though detained a few day in regular course of business.

Moneys.

The provision which we have quoted from section 16 clearly relates to "moneys" and "moneys" only. It does not say "moneys, credits and effects," and when those words are used in the latter part of the section it is simply to show the extent to which "moneys" of non-residents are to be taxed when the conditions named are presented; but no power is found to tax anything but "moneys," as distinguished from "credits."

The statutes hereinbefore quoted were inserted in our bill, as covering the authority given the assessor in this connection. The answer admits that the statutes are correctly pleaded. Had there been other statutes extending the powers of the assessor in assessing the intangible property of non-residents, it is fair to assume that the respondents would have made it known.

Kept and used. Not only is the power of taxation in this connection limited to "moneys," but it must be

"moneys *kept and used, loaned and invested in the state for profit.*" Perhaps there are two methods for construing this provision, viz., by separating the sentence so as to read "kept and used in the state for profit," and "loaned and invested in the state for profit." The other construction is that all four words, "kept, used, loaned and invested," are to be copulated together, which was the way that the Colorado Court of Appeals construed a similar statute in Hathaway v. Choury, 14 Colo. App., 478, 484, hereinafter to be more fully considered.

(a) "Kept *and* used in the state for profit."

Evidently the respondents construed the provision by dividing it, when they alleged in their answer that the "moneys and contracts" of the company to the amount of $60,000 were "kept and used" within the City of Denver during the year 1905. For sake of progress in argument, but without conceding it, we will assume this construction is correct. Then what? Adopting that view, the "moneys" must be "kept and used within the state for profit." "Kept and used" are certainly copulated together. Neither keeping the money *within* the state, without *using* it, nor using it without keeping it subjects it to taxation. Hence "moneys," as in this case, temporarily deposited in bank from one to six days, an average of three days, and then remitted to a point beyond the state, are neither kept nor used, as the words are generally understood, in reference to moneys. Money in the pocket or in a hiding place is kept but not used. Money deposited in bank and mingled with other moneys becomes the money of the bank, but the depositor is given a "credit" by the bank, which owes him the amount deposited. While so on deposit it

is not "kept and *used* in the state *for profit.*" If a person living in New Jersey sends money to his agent in Denver from someone in Montana, for the purpose of accounting and remitting to the home office, being retained in Denver from one to six days, and then sent forward, it certainly is not "kept" and can hardly be said to be "*used* in the state *for profit.*"

In this case moneys were received every day in the week, except Sunday, from stores in the nine states, and after accounting, remitted to the home office; was that money "kept and used in the state for profit?"

Allegations in Answer. The answer alleges:

"The plaintiff, a corporation * * * of New Jersey * * * is operating a general agency * * * throughout a district comprising the states of Montana, Idaho, Utah, Wyoming, Colorado, South Dakota, Nebraska and Texas and the territories of New Mexico and Arizona * * * and that all the business done by the plaintiff company * * * is done through the general agency * * * and that all remittances and money and property belonging to the plaintiff * * * is registered, held and used by the general agency * * * and deposited in banks in the city and county of Denver, * * * and, the amount *on hand held, kept and used* * * * *in Denver* during the year 1905 exceeded $60,000, and that by reason thereof it was its legal duty to pay taxes on * * * $60,000 personal property.'"

While condensing the allegation, for brevity, we have quoted all the material matter in the answer bearing on the grounds for taxing the $60,000 of "moneys, notes and credits" of complainant.

The foregoing is an *affirmative* allegation, and it devolved upon the *respondents* to prove it. No proof was presented, or attempted, except on the cross-exam-

ination of plaintiff's witness, Stewart, who testified (pp. 23-24):

"The business done at these stores is turned into this central office. * * * Reports are made weekly from all the stores. There accompanies these reports, leases or contracts for machines sold on time, and money collected on accounts or for cash sales, which is *remitted to New York weekly.* * * * These contracts and leases are sent to New York once a month." Q. "Is any of the *money retained* in the Denver office?" A. "No." Q. "Are any of these *leases or contracts retained* in the Denver office?" A. "No." Q. "Was that the way in which the business was done during the year ending March 31st, 1905?" A. "Yes, sir. And when they are sold the contracts and leases are sent to Denver with the money each week, and then sent on to New York weekly, and this is a *constanly recurring process kept up during the year.* It does not vary at all. * * * We remitted *each week* to New York, regardless of the date. * * * We tried not to have anything here at the end of each week."

This will suffice. More would be wearisome.

It proves that none of the money—not even $60,000 or any other sum—"was held, kept and used in Denver during the year 1905." Hence, the respondent's case completely fails on the basis of fact.

As to Credits.

Observe that there is NO ALLEGATION in the answer that the $60,000 assessed on notes, contracts and credits and money deposited in bank *grew out of the business done in Denver either in the local store or otherwise, nor* was there any *evidence* to prove such an allegation had it been made. The nearest to it was the following (folio 61):

"Q. Can you tell the *value of the machines,* to which your company retained the title and which were in the *state of Colorado* during the year in question?" A. "No, I cannot tell you that." Q. "Amounted to $100,000?" A. "I really cannot say." Q. "Is it not a fact, Mr. Stewart, that you had, during the year in question, *machines scattered throughout the city and state,* which had been delivered in previous years, as well as those which had been delivered within the year in question and to which you still held title?" A. "We had *machines* out on lease."

The witness said he could not estimate the value of such machines.

Keeping in mind that the *addition* to the assessment was not made on machines, but on money, notes and credits, and remembering the *allegations in the answer,* and the authority given the assessor in the statute quoted, we submit that the evidence as to the *value* of *machines* to which the company retained title is wholly immaterial. The company "returned" for taxation all its machines in Denver, and those in other counties were "returned" there. This controversy is not over *machines* taxed, but over the tax on "money, notes and credits" received from *nine* states and territories, which, after temporary delay, were forwarded to New York. There is neither allegation nor evidence that any of the debtors resided within the limits of the City of Denver.

From the foregoing it must appear that neither in the pleadings nor proof is there any basis for this assessment.

Credits in Denver.

But it may be contended here, as heretofore, that there was $60,000 worth of credits, based on Den-

ver local business and owed by debtors residing in that city.

Our answers to that are several:

(1) Neither the *allegation* nor the *proofs* cover such a case.

(2) The revenue act confers on the assessor no authority to assess any such "money, notes and credits."

(3) Debts are not "moneys." Under the Colorado act, "*Moneys* kept and used, loaned and invested in the state for profit," are the species of intangible property which are subject to taxation.

(4) Debts of a resident, owed to a non-resident, evidenced by paper which is held by the non-resident out of the state, are not property *within* the state, nor have they any *situs* for taxation within the state, but its *situs* is the domicile of the creditor.

The consideration of the last proposition will, except as to the questions of evidence and pleadings, involve the others, so we will give it our principal attention in this connection.

The construction of a statute similar to this has been announced by two decisions of the Appellate Courts of *Colorado*, which by courtesy, will doubtless be considered binding on the Federal Courts.

The first of these cases was Board, etc., Arapahoe County v. Cutter, 3 Colo., 349, where a resident of California held notes against a resident of Arapahoe (now Denver) County, Colorado. These being assessed, the question was whether they were taxable. The Court, among other things, said:

"Debts due from a resident of Colorado to a resident of California are in no legitimate sense the property of the debtor; they belong to the creditor; they have no *situs* apart from the residence of the owner. Al-

though the *situs* of the real estate by which the notes were secured was within the jurisdiction of the taxing power, the debts evidenced by the notes were the principal things and trust deeds securing them were mere incidents depending for their very existence upon what they secured. Liquidation of these debts would at once cancel the trust deeds. A trust deed itself is but a *chose in action* attached to the person of its owner. A debt is invisible and intangible, *following the creditor's domicile*, and wherever that may be he is within the reach of taxing power. But, as the domicile of the owner of the *choses in action* upon which taxes were paid *was in California, it cannot be said that they constitute property within the late* territory of Colorado, and were, therefore, not the subject of taxation here." (Numerous citations.)

In the Cutter case the creditor and the securities held by him were, as in the case at bar, both in a state outside of Colorado, though the debtor and the land by which it was secured were in the county where the tax was laid; and such were most of the cases, cited in the Cutter case.

But in Hathaway v. Choury, 14 Colo. App., 478, 484, the Appellate Court was called to take a step farther, where the creditor resided in another state, but he had left for collection with an *agent, residing in Colorado*, the notes and mortgages which covered lands, also in Colorado. Hathaway, as agent of French, a resident of Missouri, had the possession and custody of the notes and mortgages for collection. He was authorized to receipt for the money, execute releases, etc. The notes, amounting to about $20,000, were assessed in Costilla County, Colorado, where the debtors resided and where the mortgaged land was located, for the years 1891, 1892, 1893, 1894 and 1895. The Court, on p. 484, says:

"The record presents very sharply the question, whether notes and securities belonging to a non-resident, and which are held in the state by an agent for the purpose of collection and reduction to money, without authority to loan the money thus collected, or re-loan it, is property which is subject to taxation."

(Page 483.) "As we view it, the matter has been wholly settled by a decision of the Supreme Court, which is a controlling authority with us and must be followed unless we can discover something in the statute taking the present case out of the scope and operation of that decision.

"It was held in the case of Board, etc., v. Cutter, 3 Colo., 348, that a promissory note was in no sense the property of the debtor and not subject to taxation under the laws of Colorado, although the note might be secured on real estate within the taxing jurisdiction. * * * It was held that debts belonging to the creditor have no *situs* apart from his residence.

(Page 484.) The statute is as follows: "All moneys owned by non-residents that are *kept and used and loaned* within the territory of Colorado for the *purpose of investment and profit* shall be subject to taxation the same as personal effects and choses in action of persons domiciled in this territory."

(Page 486.) "As we read this statute it is plain, simple and to be interpreted according to its exact terms, and the *county authorities must make a case precisely within its limits*, if they would take it out of the general principle which the Cutter case approved and established.

"According to the act, 'Moneys owned by non- residents' are *not subject* to taxation, like the personal effects of persons domiciled in the state unless they are, according to the terms of the act, 'kept and used, and loaned within the state for the purpose of investment.' The *moneys, notes and credits* must not only be *kept*, but they must be *used* and *loaned* here for the *purposes of profit*. In other words, there must be in some manner

and in some sense a *use of the funds* in the state for business, and in some sense a use of the funds in the business purposes. * * * The statute evidently contemplates the *keeping* of the moneys in the state for *business purposes*, loaning, collecting, reinvesting, and using for profit. * * * It must be observed that the language of the act, in its conjunctive form, requires this construction. The money must not only be *kept here*, but it must be *used* here, and it must be *loaned* here, and these three words taken together clearly indicate the legislative purpose."

We have made this long extract from a Colorado case because it is the construction of a similar act, differing in no material sense from the present act made by one of its Appellate Courts of last resort, in interpretating one of its own statutes. The Supreme Court and the Court of Appeals both agree upon the same construction of that act. The present section 16 was evidently intended to improve the expression of the former section without changing the meaning. If, however, changes are noted observe that the former section begun with the words "*all* moneys," instead of "*the* moneys," as at present. The word "invested," in this section, takes the place of "for the purpose of investment." To be taxed under the former act the money must be here "for the purpose of investment" now, before the funds are taxable the purpose must be executed.

We are aided in these views by section 49 of the present revenue act, which, among other things, says:

"In listing the moneys, credits * * * the *person* making the list shall state the average of such moneys and credits, * * * if he has not been a *resident of the county* so long, * * * then he shall take the average during such time as he may have been *so resident.*"

From this it appears that the intention was to tax "moneys and credits" only after the *taxpayer* should have become a *resident*, or, as provided in section 16, "the moneys should be kept and used, loaned and invested within" the county.

While the "person," mentioned in section 49, was a non-resident of the county, it was not his duty to make return there of his "moneys and credits." If he never became a resident of a certain county, then he would pay taxes in the county only in which he was a resident. This recognizes the doctrine that the *situs* of moneys and credits follow the person.

Non-residents of the state pay taxes only on their moneys which "are kept and used, loaned and invested there for profit."

Again, section 53 provides:

"In listing the amount of notes and credits held by him, the person making such schedule may deduct therefrom the *amount of all his debts* * * *"

These are not provisions applicable to non-residents, because there could be no way in which the authorities could verify the statement. This section contemplates that the party shall list all *his* notes and credits. The Singer Company is doing business in every State. Must it list all its "notes and credits" in *every one* of these forty-eight states? The only answer is, that it should list all its "notes and credits" *once* in the state of its domicile.

In harmony with these views of the Colorado cases is the doctrine of the Federal Supreme Court in State Tax on Foreign Held Bonds, 15 Wall, 300, where, per Field, J., it is said:

"*Debts* owing by corporations, like debts owing by individuals, are not property of the debtors in any sense.

They are obligations of the debtors and only possess *value* in the *hands of the creditors.* With them they are property and in their hands they may be taxed. To call debts property of the debtors is simply a misuse of terms. All the property there can be, in the nature of things, belongs to the creditor, to whom they are payable *and follows their domicile wherever that may be.* The *debts* can have no *locality separate* from the parties to whom they are due."

The New York Court of Appeals, in "In re Bronson, 150 N. Y., 1, after quoting the language of Justice Field, above, in approving same, said:

"It seems difficult to furnish an argument in support of the view that a debt owing to a *creditor* is *property* which *follows him everywhere*, and not within the printed obligation expressing the indebtedness, that is not presented in the foregoing opinion."

The case of the "Foreign Held Bonds" is the leading case in the country and is followed wherever the question has come up.

This Court, after approving the opinion in the "Foreign Held Bonds" case, among other things, in Kirtland v. Hotchkiss, 100 U. S., 491, said:

"The *debt*, though a species of intangible property, may, for the *purposes of taxation*, if not for all others, be regarded as *situate at the domicile of the creditor.*"

The doctrine announced in the case of "The Foreign Held Bonds" has been adopted and followed in numerous cases, among them:

Commis. v. Hays, 8 B. Mon., 1.
Babcock v. Cass, etc., 65 Iowa, 110.
Hayne v. Deliesseline, 3 McCord, 874.
Herron v. Kuran, 52 Ind., 472.
Foresman v. Byrns, 68 Ind., 247.
Thomas v. Mason Co., 4 Bush., 135.

Grant v. Jones, 39 Ohio St., 506.
Goldgard v. People, 106 Ill., 25.
People v. Eastman, 25 Calif., 601.
People v. Whartonby, 38 Calif., 461.
Mayer v. Pleasant, 41 La. Ann., 645.
Lanesboro v. Berkshire Co., 131 Mass., 424.
Stephens v. Booneville, 34 Mo., 323.
Ferris v. Kimball, 75 Tex., 476.
People v. Davis, 112 Ill., 275.
In re Fair, 128 Calif., 614.
State v. Kidd, 125 Ala., 420.
Pacific, etc., v. City, etc., 133 Calif., 14.
Murray v. Charleston, 96 U. S., 432.
Boyd v. Selma, 96 Ala., 144.
Borden's Appeal, 208 Ill., 369.
In re Union Tank Line, 204 Ill., 347.
Scripps v. Board of Review, 183 Ill., 278.
Frothingham v. Shaw, 175 Mass., 59.
Ells v. Holder, 12 Fed., 668.
State v. Van Syckle, 40 N. J. L., 366.
Baltimore v. Hussey, 67 Md., 112.
Territory v. Delinquent, etc., (Ariz.) 24 Pac., 182.
Collins v. Miller, 43 Ga., 336.

In the latter case the Georgia Court changed its views from those in earlier decisions.

The Circuit Court of Appeals (4th Circuit), in Pyle v. Brenneman, 122 Fed., 787, said:

"The general rule is that *debts* follow the person of the creditor and are to be *taxed at his domicile.* * * * The *credit* is *not within the state's jurisdiction,* and no value to the debtor, and it is *not property within the state,* but property of the creditor, *taxable at his place of residence.* For the *purpose of taxation a debt*

has its situs at the *residence of the creditor* and may be taxed there. Debts are not property. A non-resident creditor of the city cannot be said to be, by virtue of a debt, which it owes him, a holder of property within its limits."

This case also holds that *money* on *deposit* in *bank* is a credit which follows the person of the creditor. The question has come before the courts in several phases. Where the tax was levided (1) at domicile of the debtor, (2) at domicile of the creditor, (3) on notes in hands of an agent for collection, (4) where the debtor was in one state, the creditor in another, and the securities in a third. In all such cases Judge Cooley, in 1 Cooley on Taxation, pp. 88-9 (3d Ed.), says:

"As property lying *beyond the jurisdiction* of a state is not a subject on which the taxing power can legitimately be exercised, that power does not, as a general rule, extend to *intangible personal property* of a *non-resident;* for such property must ordinarily be regarded as having its *situs* at the *domicile of the owner.* It follows that debts and other *choses in action* are, with certain exceptions which will be noticed hereafter, *taxable only* in the *state where the owner resides.*"

Numerous citations.

In State v. Dorcy (N. J.), 16 Atl., 160, it was held beyond the power of a state to fix the *situs* of credits for taxation except that of the creditor residing in a foreign jurisdiction.

The Supreme Court of Wisconsin said:

"When as here, there is an *absence of statute,* prescribing a different rule, we must hold that for the *purposes of taxation* a debt has its *situs* at the *residence of the creditor,* and may be taxed there."

State v. Gaylord, 71 Wis., 316.

In Montana the statute requires the taxation of

" all property *within* the state." In Holland v. Board, etc., 15 Mont., 460, the Court said:

"The debt, if owned and controlled by one not a resident of the state, is *not property within the state* subject to taxation, but can be assessed only at the *domicile* or place of residence of the creditor without reference to the domicile of the debtor."

The following cases support the same doctrine:

McCartney v. Casky (Kans.), 71 Pac., 832.

Barber v. Farr, 54 Iowa, 57.

Inhabitants, etc., v. Watson, 98 Me., 379.

N. Y., etc., v. Pennsylvania, 153 U. S., 628.

The Supreme Court of Iowa, in Barber v. Farr (*supra*), held that a tax on "moneys and credits" at any other place than the residence of the owner was "illegal and void."

So, in Hunter Supervisors, 33 Iowa, 367, a note on deposit in Illinois, but owned by a resident of Iowa, was held taxable in Iowa.

So, in Cover v. Halton (Iowa), 113 N. W., 470.

In Johnson Co. v. Hewett (Kan.), 93 Pac., 186, promissory notes, given by a resident of Missouri, secured by mortgage on Missouri land, and on deposit in bank in Missouri, but owned by a resident of Kansas, were held taxable in the latter state.

Taxing at Business Situs.

In some states cases have arisen, based on a tax of non-residents at their business *situs*, under *express statutes*, of which the following, in New York, is an example:

"Non-residents of the state doing business therein shall be taxed upon the *capital invested* in *such business*

at the *place* where such business is *carried on* to the same extent as if they were residents of the state."

Under this statute was Burke v. Wells, 208 U. S., 14, 24, where a foreign corporation imported goods into New York, which it sold at a *regular place of business* for cash and notes, which were *retained* in New York, *collected there* and the proceeds *used in the business there*. The facts showed that the *notes* were *"capital invested* in *such business"* and were taxable there. There is no such statute in Colorado, but the facts shown in that case would bring it closely within the reach of the Colorado statute. Neither the law nor the facts were parallel to those here.

Under the same statute, in People v. Feetner, 78 N. Y. Suppl., 1017, where a Colorado corporation, with a principal place of business in Colorado, but having an *office* in New York, where the *directors* sometimes met and were authorized to do business, and where it had a safe, office furniture and fixtures and $3,500 on *deposit* in New York bank. This money on deposit was taxed, but the Court said the facts "clearly did *not bring it within the statute*, making it liable to taxation."

Under the same statute came People v. Barker, 39 N. Y. Suppl., 151, affirmed by Court of Appeals in 149 N. Y., 623, where a foreign corporation, having its manufactory and principal office at Cleveland, Ohio, sent its manufactured goods to a *salesroom in New York* for sale, *the proceeds of which*, except a small amount for rent, etc., were sent to Cleveland. Held, that the personalty in New York was not taxable. That is going farther than we ask the Court to go in this case.

Several cases have come before this Court from Louisiana, where foreign corporations were assessed under a statute which provides for the taxation of

"All rights, credits, bonds, and securities of all kinds, promissory notes, open accounts, and other obligations * * * and all movable and immovable, corporial and incorporial articles or things of value, *owned and held and controlled within the state* of Louisiana by any person or in any capacity whatsoever. Provided, further, that in assessing mercantile firms, the true intent and purpose of this act shall be held to mean the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in the aggregate a *fair average of the capital*, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state *business interests* that may claim *domicile* elsewhere, the intent and purpose being that *no non-resident*, either by himself or through an agent, shall *transact business* here without paying to the state a corresponding tax with that exacted of its own citizens; and all *bills receivable, obligations or credits, arising from the business* done in *this state* are hereby declared assessable within this state, and at the *business domicile* of said non-resident, his agent or representative."

It will be readily seen that such a statute presents for consideration propositions altogether different from those before us under the Colorado statute, but the facts here would not be covered by the Louisiana statute had this tax been levied in that state.

Under this Louisiana statute securities were assessed in Board, etc. v. Comptoir, etc., 191 U. S., 388, 401. There the moneys were sent from France to an agent in New Orleans for investment by loaning according to his *own discretion*. The agent loaned the

money in New Orleans, collected principal and interest, deposited in bank in New Orleans subject to his own check, reloaned it in *his discretion*, taking notes payable at the *agent's office* in that city, with securities *retained* in his own hands, which he indorsed and collected. These moneys were "kept and used, loaned and invested in the state for profit" and would be taxable in Colorado. In the "Comptour" case the first contention was that the *act* was unconstitutional as being beyond the power of the legislature; this contention was overruled and the CAPITAL *invested*, as evidenced by the securities taken and held, was considered taxable.

Perhaps the case of The Metropolitan Life Ins. Co. v. New Orleans, 205 U. S., 393, based on the statute of Louisiana, quoted above, is the strongest case in support of the respondent's contention, but it does not apply to the case at bar. In the first place, the tax was based on a Louisiana statute, which is wholly different from that of Colorado. This court was called upon to construe that statute, which the Supreme Court of that state had construed, so the first question was whether this court, following the usual rule, would adopt the construction given the statute by the highest tribunal of the state—the rule which we invoke in construing the Colorado statute. This court having decided to follow that rule, the next question was whether the statute itself was contrary to the *Federal* Constitution, and, in upholding the constitutionality of the statute, this court, among other things, said:

"The *law expressly provides* that all bills receivable, obligations or credits, arising from the *business done in the state*, shall be assessable at the business domicile of the non-resident. Thus it is clear that the measure of taxation *designed by the law* is the fair *aver-*

age of the capital employed in the business. * * * The tax was levied in obedience to the *law of the state*, and the *only* question here is whether there is anything in the constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was *within* the *territorial jurisdiction* of the state. Property situate *without that jurisdiction* is beyond the state's taxing power and the exaction of a tax upon it is in *violation* of the 14th Amendment of the Constitution."

It appears from the parts of the opinion not quoted above that the Louisiana statute imposed the tax on "*Capital* employed in the business of mercantile firms," and that the "*stocks, goods,* and *credits* shall be taken into account to the end that the *average capital* employed in the business" may be ascertained and taxed.

This court, in that case, was cautious not to hold that *credits*, owned by non-residents, even though based on business done in the state, were taxable, but held that the credits might be taken into consideration in determining the amount of *capital* employed in business in the state.

Comparing the doctrines of the Metropolitan Life case with the case here, we find:

(1). The statutes of Louisiana and Colorado are different.

(2) In *this* case, the tax was not imposed upon *money or credits*, employed in business done within the taxing jurisdiction of the Denver assessor. (3) The tax was not imposed upon *capital* employed in the business. (4) The property taxed was *not within* the *territorial jurisdiction* of the taxing power, because, (a) The tax was levied upon credits which were owed, owned and held outside the state, by non-residents. (b)

The tax was not on "Money kept and used, loaned and invested, *in the state for* profit." (d) The "credits" taxed did not arise out of business done *within* the taxing district. (e) The company had no *business* domicile within the state.

(5). Instead of asking this court to adopt the *Colorado* construction of a similar statute, the respondents ask for a construction which the Colorado Supreme Court held was untenable.

We understand that the right to tax is based upon protection. Unless there is the reciprocal relation of protection and taxation, the right to tax does not exist. Property outside the state, for that reason is not taxable. To the extent that protection is afforded, the complainants made return of its property, amounting to $3,800 within the taxing district. On that the company tenders the tax and is ready to pay. To that extent it has a business domicile in Denver.

We have been cited to The Liverpool, London and Globe Ins. Co. v. Board, etc. of New Orleans, 221 U. S., 346, based on the same Louisiana *statute* as in the Metropolitan Life case. It was there contended that the tax violated the provisions of the 14th Amendment in taking property without due process of law. The court reviewed the several Louisiana decisions upholding the law, and also the case of New Orleans v. Stempel, 179 U. S., 309. The State Assessors v. Comptoir, etc., 191 U. S., 388. The Metropolitan Life case, to which we have referred, all of which grew out of the same statute and the construction placed thereon by the State Supreme Court. The argument of Mr. Justice Hughes was based upon the question as to the power of the state to tax the credits described. The contention was

that the tax was in violation of the 14th Amendment. On that point, the opinion says:

"*Louisiana* must be deemed to have had jurisdiction to impose the tax. The *credits* would have had no existence but for the permission of Louisiana; they issued from the business transacted under *her sanction within* HER BORDERS and there the rights of the creditor were to be enforced."

The facts here are different. The debtors resided in nine different states, and the credits grew out of business done in those several states. The credits did not exist by the permission of Colorado. They did not "issue from the business transacted under *her* sanction" or "within *her* borders;" nor were the rights of the creditors "there" "to be enforced." Hence not only is the Colorado statute different from Louisiana, but the circumstances of the cases are wholly different. The Denver assessor had no jurisdiction over Arizona or Utah debts owing to a New Jersey corporation.

The opinion in the Liverpool L. & G. case, further says:

"The decision in State Tax on Foreign Held Bonds, 15 Wall, 300, is not in point. *There* the tax was on the interest on bonds *made* and *payable out of the state* and payable and *issued* to and *held by non-residents* of the state."

In the case at bar, "the tax was on credits *made* and *payable out* of the *state* and payable and *issued to* and held by *non-residents* of the state."

Again, the same opinion, referring to Kirtland v. Hotchkiss, 100 U. S., 491, and distinguishing it from the Louisiana cases, said, concerning the Kirtland case:

"It was *assumed* that the *situs* of such intangible property as a debt, evidenced by a bond, was at the domicile of the owner. *There was no legislation attempting*

to set aside that ordinary rule in respect to the matter of situs.

In Colorado, according to the holdings in the Cutter case and in the Hathaway case, from each of which we have hereinbefore made liberal extracts, "there was no legislation attempting to set aside that ordinary rule in respect to the matter of situs," but on the contrary the legislation of Colorado as construed by the Colorado courts followed the rule announced by this court in the State Tax on Foreign Held Bonds.

The conclusion therefore is this, that, in the absence of express legislation fixing a business *situs* for the taxing of *capital* invested in a state, credits, owned and held by a non-resident, follow his person and are taxable only at his domicile.

In the Metropolitan Life case, as quoted by Mr. Justice Hughes in the Liverpool, L. & G. case, the distinction between the class of cases under the Louisiana statute, and this case, is shown by the following excerpt.

"The state undertook to tax the *capital* employed in the business precisely as it taxed the *capital* of its own citizens in like situations. For the purpose of arriving at the amount of *capital* actually employed it caused the *credits* arising *out of the business* to be assessed."

Hence, the legislature of *Louisiana* did not undertake to tax the credits, as such, held by non-residents, because credits so held, as such, are *not within* the state; but it did undertake to tax money invested *in the state* in the form of *capital* employed in business. The legislation in Colorado, as construed by the Supreme Court of that state, does not take the case out of the rule of "The State Tax on Foreign Held Bonds."

Other States.

In New York, Minnesota, Nebraska and some other states, there are laws quite similar to each other for the purpose of assessing foreign *capital* used or invested *in the state* for profit. Cases have been decided which arose under these statutes, where the investment was purely local and where the construction of the *statute* determined the question as to the validity of the tax, and they form no precedent to guide us in this case.

Thus, in Bristol v. Washington Co., 177 U. S., 133, moneys were in the hands of an agent in Minnesota with authority to loan, collect and *re-loan, in his discretion.* Using the language of the Colorado statute: "the moneys were kept and used, loaned and invested within the state for profit," and were held taxable under the Minnesota statute. A similar case was that of Finch v. York Co., 19 Neb., 50, where the Nebraska court held the moneys taxable under the laws of that state, and doubtless would be held taxable under similar *facts* in Colorado.

In those cases, the business done was *local,* and the statute required the *capital* to be taxed "at the *place* where such business is carried on." In the case at bar, the *answer* alleges:

"That the plaintiff * * * is operating a general agency for the sale of sewing machines in the State of Colorado with sub-agencies throughout a district comprising the states of Montana, Idaho, Utah, Wyoming, Colorado, South Dakota, Nebraska and Texas, and the Territories of New Mexico and Arizona. * * * And that *all remittances* and all money and property belonging to the plaintiff and *used in the operation and conduct of the business* in the territory comprising *ten states* and

territories as hereinbefore alleged, is registered, held and used in the general agency at Denver * * ."

The *answer* further alleges that the amount of business done in these *ten states* which was conducted by and passed through the general agency at Denver in the preceding year amounted to more than $1,000,000.

While these allegations were not sustained by evidence, they disclose the assessor's theory, which does not bring the tax within the Colorado statute providing, that "*moneys* of non-residents, kept and used, loaned and *invested within the state for profit* shall be subject to taxation." According to the averments the attempt was made to tax *in Denver* moneys and credits used in conducting a business throughout the ten states composing the entire Rocky Mountain region. There is no pretense that the respondents made, or attempted to make, a case within the Colorado statute. As said by the Court of Appeals, in Hathaway v. Choury, hereinbefore cited and quoted from by us:

"As we read the statute it is plain, simple and to be interpreted according to the *exact* terms, and the (county) *authorities must make a case precisely within its limits* if they would take it out of the general principle which the Cutter case approved and established."

From this it appears that it devolved on the RESPONDENTS *affirmatively* to "make a case precisely within the limits" of the statute, if they would take it out of the general principle announced in the case of *The State Tax on Foreign Held Bonds*. This they failed to do. They made an effort to show that some of the business done by the complainants originated within the City and County of Denver, but utterly failed to prove the extent of it, or that the credits taxed originated there. Had they succeeded in such proof, how would it have benefit-

ed the respondents? Would it have shown that the "moneys" of the complainant were "kept and used, loaned and invested within the state for profit?" Suppose it had been shown that half a dozen car loads of sewing machines had, by the Singer Company, been sold in Denver during the previous twelve months and the "moneys" arising therefrom had been sent through the Denver general agency to the home office, would that *money be taxable?* Or suppose some of the purchasers of sewing machines had failed to complete the payments for the machines and that they were owing money therefor to a non-resident, would that bring the "moneys" within the provisions of the statute? We apprehend that a large proportion of the merchants of Denver are owing purchase money for goods to non-residents jobbing houses, the major portion of which may have been sold to the Denver merchants on the ground, through soliciting agents of such non-resident jobbers; are such non-residents subject to tax in Denver on such moneys under the provisions of that statute?

The views for which we contend are fully sustained by the eminent author of Cooley on Taxation, 3d Ed., p. 88, and in the following cases, many of which are cited by that author.

New York, etc. v. Pennsylvania, 153 U. S., 628.

Cooper v. Beers, 143 Ill., 28.

Hagwood v. Board, etc., 189 Ill., 112.

Oliver v. Washington Mills, 11 Allen, 268.

Shipps v. Fulton, etc., 204 Ill., 345.

McKean v. North Hampton Co., 49 Pa. St., 519.

Worthington v. Sabastian, 25 Oh. St., 1.
People v. Davis, 112 Ill., 272.
Inhabitants, etc. v. Watson, 68 Me., 379.
State v. Dewey (N. J.), 16 Atl., 160.

The Supreme Court of Wisconsin, in holding that the question is largely regulated by statute, concisely stated the rule, in State v. Gaylord, 73 Wis., 316 (41 N. W., 521), as follows:

"When, as here, there is an *absence of statute* prescribing a different rule, we must hold that, for the purposes of taxation, a *debt* has its *situs* at the *residence of the creditor* and may be taxed there. This rule is certainly supported by the great weight of authority." (Numerous citations.)

We call attention to the following case in Montana, because it has recently been reviewed and approved by the Supreme Court of that state, after very careful consideration, viz: Holland v. Board, etc., 15 Mont., 460, 39 Pac., 575, the court said:

"The debt, if owned and controlled by one not a resident of the state, *is not properly in the state*, subject to taxation as provided by the Revenue Act, but can be assessed only at the domicile, or place of residence of the creditor without reference to the domicile of the debtor."

This case was approved and followed by the Montana Supreme Court in the recent case of Monidah Trust v. Sheehan, Treasurer, 123 Pac., 692.

"Not property *within* the state" is the language of the Colorado Supreme Court in Cutter v. The Board, hereinbefore mentioned by us.

In Buck v. Beach, 206 U. S., 392, the creditor resided in New York, the debtor in Ohio, but the evidence of the debt (the notes and mortgage) were in possession of a party in Indiana, where they were assessed

for taxation; it was contended also that the documents were kept in Indiana for the express purpose of escaping taxation in Ohio. That case presents points in some respects parallel with this. Here the debtors reside in ten different states, the creditor resides in still another state and it is erroneously *alleged* that the paper is kept in Colorado, a third state, where it was assessed. Assuming the allegation to be true, then, under Buck v. Beach (supra), the paper, or credit, could not legally be taxed in Colorado.

This court on that point, held:

"The debts here in question were *not property within the state* of Indiana, nor were the promissory notes themselves, which were only *evidence* of such debts."

This court, in the Buck case, reaffirmed and approved the doctrine of The State Tax on Foreign Held Bonds, as a *leading* case and as announcing the true rule.

In the quite recent case of Commissioners v. Northwestern, etc. (Ky.), 107 S. W., 233, it was held that notes and other evidences of debt were "not property *within* the state." So also,

N. Y. Life v. New Orleans, 158 Fed., 462.

In considering the power of the local authorities of a city and county to tax property not "within the state," it is clear that *tangible* property which is physically beyond the limits of the state cannot be so taxed, because such property is outside of the jurisdiction of the taxing officers, and such a tax would be null and void. This doctrine applies to tangible and visible property, but is not the doctrine equally applicable to property which is intangible and invisible and which, in

contemplation of law, is not within the limits of the state? Property which by *rule of law* is beyond the state boundaries is as much outside of the taxing jurisdiction as visible and tangible property. Suppose the complainant owned a sewing machine located in its store for sale at Albuquerque, New Mexico. All agree that the property, while there, could not be taxed in Denver, because beyond the jurisdiction of the taxing officers, and no decision of an assessor in Denver could alter the fact, or bring the property within his jurisdiction. Suppose, however, the complainant should sell that sewing machine in Albuquerque and take therefor a promissory note payable to the company in Albuquerque at some future date, and suppose the local agent at Albuquerque in his weekly report should send forward that note among others to the general agency at Denver where, after a proper memorandum and accounting of the note had been made, it should be forwarded with the weekly report of the Denver agency to the home agency in New York, never to return, could it be taxed in Denver? We have agreed that the sewing machine in the store at Albuquerque was beyond the taxing jurisdiction of the Denver officers. Did the fact that the value of that machine was changed into a note as described, confer jurisdiction on the Denver taxing officer to tax it, simply because, in the process of business that note was sent through Denver, detained there a few days, and then forwarded to New York, never to return?

Non-Resident Corporation.

The pleadings on each side show that the complainant is a New Jersey corporation.

We are advised, however, that this tax was imposed upon the theory that the complainant by establishing a general agency at Denver, acquired in some way, a domicile there, by which it was placed on the same footing as resident corporations.

It cannot be necessary to show to this high court that a New Jersey corporation cannot become a resident of Colorado.

Ohio etc. v. Wheeler, 1 Black, 786.

Louisville, etc., v. Latsom, 2 How., 497.

Ins. Co. v. Francis, 11 Wall., 210, 216.

Shaw v. Quinch M. Co., 145 U. S., 444.

Southern P. Co. v. Denton, 146 U. S., 202.

Empire, etc. v. Empire, etc., 150 U. S., 159.

In *Ex Parte* Shollenberger, 96 U. S., 260, 268, this court said:

"A corporation cannot change its residence, or its citizenship. It can have its legal home only at the place where it is located, by or under the authority of its charter, but it may by its agents transact business any where."

So, in R. R. Co. v. Kountz, 104 U. S., 5, 11, it is said:

"By doing business away from their legal residence they (corporations) do not change their citizenship, but extend the field of their operations. They *reside* at home *but* do business abroad."

By complying with the laws of the state relating to foreign corporations, they do not change their residence.

South Pac. v. Denton, 146 U. S., 102.

In re Kensby, etc., 160 U. S., 221.

Taxing "All Other Property."

Under the contention that the proceedings of the assessor and the tax based thereon would be "taking property without due process of law," and as also showing the *motive* and *intention* of the assessor, we call attention to the second item of the *addition* made by the assessor, viz: "All other property, $2,500.00."

No attempt is made in the answer to defend or explain it. What it means we do not know. The uncontradicted testimony of Mr. Stewart, the only witness in the case, conclusively shows that the company had "no other property" in the city of Denver during the preceding revenue year. But if it had, the assessment would be *void* for uncertainty, and because *no property was there assessed.* Suppose the assessor, instead of making his addition of assessment on "Money, notes and credits," had made the entire addition on "All other property, $62,500," what would the Court say as to such an addition? It would be void on its face.

A little figuring will show that the rate for taxation that year was about 3½ per cent, which would make the tax on "All other property" about $87.50. If the Company should be compelled to pay the tax, the result would be taking $87.50 not only "Without *due* process of law," but without *any* process of law. As no attempt to defend this part of the assessment is made in the Answer, so no effort to defend it was made by evidence, argument or printed brief. Therefore, by silence, they admit that the tax on "all other property" is indefensible. In other words, it is *void.*

The sum of $87.50 looks small. Standing alone the complainants might have paid it. But it does not stand alone, and besides, it represents a principle; coup-

ling it with the $60,000 assessment on "Money, notes and credits," it convinces that the omission of the statutory notice to the Company was deliberate and intentional. It demonstrates that the entire proceeding was conceived in iniquity wth the intent to execute it in secrecy, until after no legal defense could be made. Taxing foreign corporations was a fad. What cared that assessor whether corporate property was taken "without due process of law" or not. It was not contrary to popular sentiment.

Taxation is necesasrily either a proceeding *in personam* or *in rem*, or both. *Here*, there was no jurisdiction *in personam*, because the statutory notice by which such jurisdiction could be acquired was not given. There was no jurisdiction *in rem*, because jurisdiction *in rem* must be directed against a *definite* thing. This assessment against "all other property" is against no distinct property—no thing—nothing.

Taxing it Elsewhere.

It was contended orally at the hearing, without any pleading on which to base the contention, that the $62,500 assessment should be assessed in Denver, because it was not *proven* that it was taxed elsewhere. That was no defense, because, (1) There was no issue on that point, hence evidence thereon would have been bad practice. (2) The only *material* question was whether the property was taxable in Denver. (3) The property was taxable at the domicile of the company, and it is fair to presume that both the company and the taxing officers at the company's domicile did their duty. (4) To claim that Denver can tax all property which is not affirmatively proven to be taxed elsewhere is an absurdity.

No authority ought to be needed to sustain this position, but we will refer the Court to Shirk v. Township, etc. (Iowa), 114 N. W., 884. The plaintiff had formerly lived in Iowa, where he loaned money to *residents of the taxing district* where the tax was levied. Afterwards he moved to Oklahoma, taking with him all his "Moneys, notes and credits," on which assessments in Iowa continued to be made. It was contended that he must pay the tax in Iowa, unless he could "show that his property was assessed in the other state," but the Court in deciding to the contrary said:

"The record shows that he raised the question of non-residence before the board (of equalization) and he was *not required in order to establish his claim to show that his property was elsewhere assessed.*"

But, had it been shown that the "money, notes and credits" were not taxed in New Jersey, or elsewhere, even pursuant to an effort to escape taxation, they were not taxable in Denver, under the doctrine of Buck v. Beach (*supra*), though physically present there at the time the assessment was made, which, however, was not the fact.

Taxing Interstate Commerce.

Levying a tax on the "moneys, notes and credits" of the complainant, originating from the sales in ten states and territories, and passing through the Denver office on their way to the home office outside of the state, is in violation of that section of the national Constitution which gives to the Congress the power to regulate commerce among the several states.

The power to regulate includes the power to tax. It is familiar history that this power over inter-state commerce was given to Congress largely because, prior to

the adoption of the Constitution; it had been the custom of some of the states to tax the commerce coming from other states in order to protect and foster their own industries. One of the strongest incentives to the formation of the strong central government and the adoption of the present constitution, was to provide for common authority to regulate commerce.

What are the facts here?

The *bill* (fol. 2) alleges:

"That the plaintiff is a corporation engaged in the business of purchasing and selling sewing machines; that the said machines are purchased of the manufacturer, the Singer Manufacturing Company, partly in the State of New Jersey and partly in the State of Indiana; that none of the said machines are purchased in the State of Colorado; that the plaintiff has established a general agency at the City of Denver in the State of Colorado, which has supervision over sub-agencies in the district comprising the States of Montana, Idaho, Utah, Wyoming, Colorado, a part of the State of South Dakota, Nebraska and Texas, and the territories of New Mexico and Arizona; that manufactured sewing machines are shipped in the original packages in carload lots from the place of manufacture in New Jersey and Indiana, to sub-agencies in each of the several states and territories, under the general supervision of the said agency in the City of Denver; that said machines are sold partly for cash and partly on credit; that when said machines are sold on credit, or partly for cash and partly on credit, notes and other obligations are received from the purchaser, which are delivered to the manager of the sub-agencies in the said several states, who make *weekly reports* of such sales to the *general agency at Denver, accompanying therewith* all the moneys which he has received and also said notes and obligations, of which, when received at said agency at Denver, an accounting is there had, for the purpose of keeping a record of such sales and the payments made thereon, and, there-

upon, at periods *not exceeding one week*, an accounting is made of all such *moneys, notes and obligations* received, and the same, together with all moneys, notes and obligations, are transmitted to the general home agency in the City of New York. * * *

That the said machines are sent for sale from the said places of manufacture and purchase in the States of New Jersey and Indiana, with the expectation that they will end their transit, after purchase, in the several states to which they are transported for the purpose of sale, where the same are sold, and when so sold, the purchase *money and the notes and other obligations*, given for the purchase thereof, are transmitted by the selling agency to the City of New York, the home agency, *through* the supervising and accounting agency at the City of Denver; that such transmission of machines for sale and the remitting of the proceeds thereof to the home agency in the City of New York, is a *constantly recurring course of commerce between the states of purchase and manufacture* and the *states where the same are sold*, and from which the proceeds are transmitted to said home agency in the City of New York; that such transmission of money, notes and other obligations from the place of sale to the place where such money and documents are permanently deposited in the City of New York, is interrupted only by temporary delay at the agency of such Company in the City of Denver, solely for the purpose of accounting and supervision; that none of the said moneys are kept and used, loaned and invested within this state for profit."

The *bill*, after alleging that the assessor of Denver added $60,000 on moneys, notes and credits to the list as returned by the Company, then alleges (page 5):

"That the plaintiff is advised that the said assessor *intended* to assess and thereby *tax* the money, notes and other obligations aforesaid, passing through the plaintiff's general agency at Denver."

The Answer (pages 19 and 20) confirms these al-

legations, except that it alleges that the moneys and obligations are "registered, held and used" in the general agency in Denver, showing that the bill was correct in stating that the intention was to tax these moneys, notes and obligations, passing through Denver on their way from the place of sale to the home agency in New York. The evidence introduced fully proved all the allegations of the bill which we have quoted, and disproved the defendant's allegation that such "moneys, notes and credits were "held and used" in the Denver general agency.

Does the *bill* show that the complainant was engaged in inter-state commerce and that the respondents undertook to assess and tax such commerce in the City of Denver?

Do the authorities of Denver possess the power under the Constitution of the United States to tax "Commerce among the several states?" Is such a tax illegal and void?

Condensing the facts alleged and proven in this suit, it appears, that the complainant is a dealer in sewing machines, purchasing them in carload lots in New Jersey and Indiana, whence they are transported in the original packages for sale in ten states composing the Rocky Mountain region, where, after sale for money, notes and other obligations, the proceeds are sent through the general agency at Denver, where they are temporarily delayed for the purpose of accounting and supervision of the business, to the home agency in New York. These proceeds accrued in purchasing new machines which are sent forward for sale. This is a constantly recurring round of business, and it appears from the bill and the answer, that it was the intent to tax these "moneys, notes and credits" so passing through Denver.

The facts, in principle, are not unlike the famous case of Swift v. United States, 25 Supreme Court Reporter, 276, where this court said:

"Where *cattle* are sent for sale from a place in one state with the expectation that they will end their transit, after purchase, in another, and where, in effect, they do so, with only the interruption to find a purchaser; and where this is a typical, constantly recurring course, the *current* thus existing is a *current of commerce among the states,* and the purchase of cattle is a part and incident of such commerce."

Substitute "sewing machines" in the above extract, in the place of "cattle" and you have a complete description of interstate commerce in this case, except that in the above the cattle were *wholly* the objects of the commerce, whereas in this case the proceeds of the commerce—the returning "money and credits" are an "incident of such commerce," which are caught on the wing and made the subject of state interruption. The returning "money and credits" complete the circuit of the current of commerce.

Probably a major portion of these carloads of sewing machines pass through Chicago on their way from the factories in New Jersey, and Indiana, to the places of sale in the Rocky Mountain states; will any one contend that the taxing officers of Chicago could legally assess and tax these machines in transit? Could such officers legally tax the *returning proceeds* also passing through Chicago, even though delayed in Chicago a day or two in transit?

Does the right to tax depend upon the length of the delay while passing through some taxing district? If Chicago would have a right to levy such a tax, then all

the other cities through which the sewing machines, or the return proceeds of sale, might pass, would have an equal right to tax.

If the authorities of Denver undertook to tax all the *sewing machines* coming into, or through, the city from outside the state, there would be no question as to it being a taxing of interstate commerce. Suppose that instead of "moneys, notes and credits," these machines should be sold for copper bars in Utah, for gold bars in Montana, for silver bars in Colorado, which should be, for the purposes of the supervision of the business, sent to the home agency in New York through the general agency at Denver, where the Denver assessor should assess the same for taxation, is there any question as to whether such an act would be taxing the commerce? Instead of gold bars, copper bars, and silver bars, the proceeds of the sale, is it any less taxing the commerce to levy a tax on the "moneys, notes and credits" being the proceeds of the sales of these machines?

Suppose the legislature of Colorado should pass a law, authorizing the assessor of Denver to tax all "money, notes and credits" passing through Denver as the proceeds of the sales of the sewing machines in the states of the Rocky Mountain region, under the supervision of some general agent at Denver, would there be any debate as to the unconstitutionality of such a tax? If the Denver assessor could not constitutionally levy such a tax *under* such a *state law*, can be levy such a tax *without* such a law?

In Brown vs. Maryland, 12 Wheat, 419, this court, per Marshall, C. J., decided that a law imposing a license tax on importers was unconstitutional.

In Almy v. California, 24 How. 169, this court, per Taney, C. J., declared a stamp tax on bills of lading given for the shipment of gold dust and silver bars, was a tax on interstate commerce, consequently unconstitutional and void.

Among the cases in this court sustaining these principles are:

Wabash, etc., v. Illinois, 118 U. S. 557.

In re Trade Marks, 100 U. S. 82.

State Freight cases, 82 U. S. (15 Wall.) 232, 271.

It being alleged in the *bill* and substantially admitted in the answer, and proven by the evidence, that the tax on "moneys, notes and credits" was a tax on the proceeds of the complainant's sewing machines, passing through Denver, from the places of sale in ten different states, going to the home agency in New York, but detained temporarily in Denver for the purposes of accounting and supervision of the business, we must conclude that the tax on these proceeds of sale is a tax on interstate commerce and therefore contrary to the Federal Constitution and void.

Equal Protection of the Laws.

Does such a tax, imposed upon the complainant's "moneys, notes and credits," under the circumstances described in the bill, deprive the complainant of another constitutional right guaranteed by the 14th amendment —"the equal protection of the laws?"

If the facts stated show, or if our process of reasoning demonstrates, that the tax would deprive the com-

plainant of property "without due process of law," the same facts and argument would convince that such a tax would deprive the complainant of the equal protection of the laws. If the complainant's property is taken "without due process of law," it is deprived of the equal protection of the laws. If the attempted tax on complainant's "moneys, notes and credits" is a tax on interstate commerce, then such a tax is depriving the complainant of the *equal* protection of the laws, because it goes without saying, that the City of Denver does not levy a tax on *all* the "moneys, notes and credits," passing through the city—the proceeds of sales of merchandise in the several Rocky Mountain states.

Although taxed *in transit*, it was shown that the "money, notes and credits," after a temporary delay in Denver, passed on to a distant state. They are no longer in that city and do not receive or require any protection of the laws. No protection of the laws is given them. It is taxation of property not "within the state," and therefore taxation without any protection. The tax violates the fundamental principle under which all taxes are levied. None of the "moneys, notes and credits" were "kept and used, loaned and invested within the state for profit," but all of it was sent away as shown by the evidence,so that on the 31st of March, 1905, all the taxable property of the complainant in Denver amounted in value to $3,800 which was duly returned by the complainant for taxation.

Believing there are no facts in this case which take it out from under the doctrine of this court, as announced in "The State Tax on Foreign Held Bonds," and in the two Colorado cases of Cutter v. The Board,

etc., and Hathaway v. Choury, both of which construed a Colorado statute similar to the present law, and believing that the tax is in violation of several sections of the national Constitution, as we have endeavored to show, we confidently submit the case to the consideration of this court.

R. H. GILMORE,
Solicitor for Complainants.

VER PLANCK, PRINCE & FLANDERS,
Of Counsel.

ASSIGNMENT OF ERRORS.

Now comes the appellant, Singer Sewing Machine Company, of New Jersey, by R. H. Gilmore, its solicitor, and says that in the record and proceedings and in the final decree made and entered herein on the 27th day of April, 1910, there is manifest error in that the United States Circuit Court of Appeals for the Eighth Circuit erred, in this, to wit:

1. In holding and deciding against the appellant and in affirming the decree of the Circuit Court and dismissing the complainant's bill of complainant.

2. In not reversing the decree of the Circuit Court and in not granting to the complainant a writ of injunction restraining the defendants from proceeding to collect the tax levied by the officers of the City and County of Denver against the complainant for the year 1905, as set forth in the said bill.

3. In not reversing the decree of the Circuit Court and in not granting the prayer of the complainant that a decree be entered declaring null and void the assessment and tax against the complainant for the year 1905 as to the valuation of Sixty-two thonsand five hundred dollars ($62,500) described in the bill, over and above the Thirty-eight hundred dollars ($3800) returned by the complainant for taxation.

4. In not finding that the situs for taxation of the complainant's property for the year 1905 upon which Sixty thousand dollars ($60,000) of the total raise in assessment was based, was outside of the State of Colorado.

5. In not finding, according to the contention of the complainant, that the tax levied upon the credits of

the complainant for the year 1905 was a tax upon interstate commerce.

6. In not finding that this action was a case for the exercise of equity jurisdiction on the ground that it appeared that the exercise of such jurisdiction would prevent a multiplicity of suits.

7. In not finding that the equity jurisdiction of the Court should be exercised in this suit because the complainant had no plain, adequate and complete remedy at law.

8. In not finding that the equity jurisdiction of the Court should be exercised in this suit because the illegality of the tax described, or the vital defects therein, do not appear upon the face of the record of the County officers, but must be shown by evidence *aliunde*.

9. In entering a decree against the complainant and in favor of the defendants, in that the said decree is contrary to the law of this case and the facts proven therein.

10. In not sustaining the complainant's contention and so finding that the complainant had no plain, adequate and complete remedy at law.

11. In holding and deciding that the bill of complainant in this suit does not set forth a recognized ground of equitable jurisdiction.

12. In holding and deciding that there was no fraud, accident, mistake or danger of a multiplicity of suits alleged in the pleadings and proofs therein.

13. In holding and deciding that the pleadings and proofs herein did not show that the complainant had property in Denver subject to distraint for the tax of 1905, referred to in the bill.

14. In holding and deciding that the pleadings and proofs herein did not show that the complainant would be injured or embarassed by any distraint or sale of its property for the purpose of collecting the tax of 1905, referred to in the bill.

15. In holding and deciding that the pleadings and proofs herein did not show that a distraint was threatened in order to collect the said tax of 1905, referred to in the bill.

16. In holding and deciding that in case of a distraint of complainant's property for the collection of the tax for 1905, referred to in the bill, complainant has a plain, adequate and complete remedy at law.

17. In holding and deciding that in case an action were brought by the proper authorities of the City and County of Denver to collect the said tax for 1905, referred to in the bill, the complainant has a plain, adequate and complete remedy at law.

18. In omitting to hold and decide that where a tax assessed by State officers is illegal and invalid, and there is no plain, adequate and complete remedy at law available under the statute under which the tax purported to be assessed, the party against whom the tax was assessed is entitled to equitable relief.

19. In holding and deciding that a Court of equity cannot enjoin the collection of said tax, in default of some other and recognized ground for equitable intervention, notwithstanding the pleadings and proof show that the State statute requires notice to the complainant of a raise in its assessment, and that no such notice appears on the face of the tax proceedings and that no such notice was, in fact, given, and that complainant had no knowledge of the raise until the time

had elapsed within which to apply for correction under the laws of the State.

20. In omitting to hold and find that the tax for 1905 levied upon the credits of the complainant, passing through the City and County of Denver as the proceeds of transactions made outside of the State of Colorado, in nine other states and territories, in the course of transmission to a state outside of the State of Colorado, was a tax upon interstate commerce.

21. In holding and deciding that the bill is without equity for not alleging accident, mistake or fraud, although the bill and proof show that the assessor, from oversight, error or design, omitted to send complainant the notice of raise of assessment required by the State statute.

22. In omitting to hold that a tax upon the property of complainant was taking complainant's property without due process of law, where it was alleged and shown that complainant had filed its schedule for taxation showing property valued at Thirty-eight hundred dollars ($3,800) and that the assessor of the City and County of Denver, without notice to the complainant as required by the State statute, had raised the valuation to Sixty-six thousand three hundred dollars ($66,-300), and that complaintant had no knowledge or information as to such raise until after the assessment and levy had passed into the hands of the collecting agent beyond any opportunity for correction.

23. In omitting to hold that the State tax described in the bill herein was, under the circumstances therein specified and shown by the proof, void, under the provisions of the 14th Amendment of the Constitution of the United States.

24. In holding and deciding that a tax based upon a valuation illegally raised by the assessor, as specified in the bill herein and shown by the proof, can be attacked collaterally.

25. In holding and deciding that a federal court of equity has no jurisdiction to grant relief against the collection of a State tax, where it was shown by the bill that the tax was levied without jurisdiction on the part of the taxing officers, and where it was contended that the bill did not in express terms allege that the taxpayer, whose property was so levied upon, had property within the jurisdiction of the State subject to distraint for the collection of such excessive tax; but where it did appear from the pleadings that the complainant had property in the County subject to distraint exceeding in value the amount of the tax.

26. In holding and deciding that notwithstanding the overruling of the demurrer herein, the interposing of the answer and the trial had on the merits, the defendants could still contend that the bill does not contain matter of equity entitling complainant to relief against the defendants, and that the Circuit Court of Appeals could consider such contention.

WHEREFORE, the appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

R. H. GILMORE.
Solicitor for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 289

THE SINGER SEWING MACHINE COMPANY, OF NEW JERSEY, APPELLANT,

vs.

JAMES F. BENEDICT, TREASURER OF THE CITY AND COUNTY OF DENVER, AND THE CITY AND COUNTY OF DENVER, APPELLEES.

BRIEF AND ARGUMENT.

I.

A sufficient statement of this case is to be found in the brief of appellant filed in this cause, and in the opinion of the Circuit Court of Appeals beginning on page 65 of the transcript of record filed in this cause. The pages hereinafter referred to are pages of the transcript of record unless otherwise designated.

The first proposition discussed by appellant in its brief is the effect of overruling the demurrer by the

Circuit Court of the United States for the District of Colorado, where this cause was begun. Appellant says that the trial court by overruling the demurrer adjudged the bill to be sufficient on its face; and that, by defendants answering over after the demurrer was overruled, instead of standing on the demurrer, which they had a right to do, they thereby waived all defects in the bill; and cites a number of cases in support of this contention.

It is perhaps sufficient to say that an examination of the cases cited by counsel discloses that the cases do not support the contention of appellant, but most, if not all, of those cases are to the effect that the question of the sufficiency of the bill in an equity suit cannot be raised for the first time in the appellate court. This was disposed of by the United States Circuit Court of Appeals in its opinion filed in this cause, found on page 66, where it is said:

"Complaint endeavors to forestall a consideration of this objection on the ground that defendant answered and went to trial on the merits. For that reason it is urged it is now too late to object to the jurisdiction in equity over the subject matter. The following authorities are cited and relied upon by the complainant's counsel: 1 Daniell's Chancery Pleading & Practice, Fifth Ed. pp. 555 and 660 et seq.; Wylie vs. Cox, 15 How. 415, 420; New Orleans vs. Morris, 105 U. S. 600; Reynes vs. Dumont, 130 U. S. 354, 395; Brown vs. Lake Superior Iron Co., 134 U. S. 530.

"An examination of these and other cases discloses that the rule invoked prevails only when the objection is made for the first time in the appellate court. In the present case jurisdiction in equity was

challenged *in limine* by a demurrer on the specific ground that the bill contained no matter of equity and upon that being overruled the same objection was again taken by answer. Until the final decree was passed no appeal lay, and the question of jurisdiction over the subject matter could not before then have been reviewed. Gates vs. Bucki, 4 C. C. A. 116; 53 Fed. 961, 964. In such cases an appeal after final decree presents for review the entire record and if for any reason the decree below was right it will be affirmed.

"The objection to our consideration of the jurisdictional question is untenable."

Another question urged by the appellant in its brief is that the Circuit Court of Appeals erred in affirming the trial court in dismissing the bill for the reason that the bill filed in this cause, and the evidence offered in support thereof, did not show sufficient facts to entitle the complainant to equitable relief. We think this is likewise conclusively disposed of by the opinion of the Circuit Court of Appeals in the following language, found on page 66, where it is said:

"Does the bill disclose a right to the injunctive relief sought? In other words, does it disclose that complainant did not have an adequate remedy at law? These are questions which if answered in favor of defendant render consideration of the merits of the case unnecessary.

"The law is well settled that unless a complainant can invoke some recognized head of equity jurisdiction the mere illegality or irregularity of a tax com-

plained of, gives no right to injunctive relief against its collection. Hannewinkle vs. Georgetown, 15 Wall. 547; State Railroad Tax Cases, 92 U. S. 575; Union Pacific Railway Co. vs Cheyenne, 113 U. S. 516; Milwaukee vs. Koeffler, 116 U. S. 219; Pittsburgh &c Ry. Co. vs. Board of Pub. Works, 172 U. S. 33; Indiana Mfg. Co. vs. Koehne, 188 U. S. 681; Taylor vs. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350, 357; Hallett vs. Arapahoe County, 40 Colo. 308."

The court concludes the foregoing discussion by saying that the bill does not disclose any recognized head of equity jurisdiction.

The only threat proved at the hearing was contained in a letter dated October 1, 1906 (three weeks before the said suit was brought), written by the treasurer to appellant (p. 68), in which the treasurer notified the appellant that its personal tax for the year 1905, amounting to $2,284.05, was delinquent, and, unless paid at once, the treasurer would be obliged to enforce collection of the same according to law. No distraint had been made upon any of the property of the appellant, nor does it appear from the record in this cause that any property of appellant was in any way distrained or attempted to be distrained, or in any manner jeopardized. There are no averments in the bill showing any fraud, accident, or mistake which conduced to the overvaluation; any cloud upon title to real estate, or danger of multiplicity of suits; or any averment confining complainant's right to relief upon any other head of equity jurisdiction except inadequacy of legal remedy.

From an analysis of the bill it appears that it is not grounded upon an equitable foundation, like fraud, mistake, avoidance of a multiplicity of suits,

removing cloud from title to real estate, or in any like manner. It rests practically upon the propositions that the tax was illegal, and that complainant had no adequate remedy at law to prevent its collection. This question is so fully and completely discussed in the opinion by the United States Circuit Court of Appeals affirming the decree of the trial court dismissing the bill, that a reading of the decision of said court, we think, will satisfactorily dispose of the whole question. And in view of the fact that appellant enters into a discussion in the first part of its brief of many phases of this case which we do not think are involved, we respectfully direct this court's attention to the opinion of the United States Circuit Court of Appeals as a sufficient and conclusive answer to all such discussions.

II.

THE EVIDENCE.

In the event this court should decide to consider this case on its merits, the following evidence is quoted from the record as being pertinent to the issues, beginning on page 24:

"Q. These carloads—they are distributed from the point to which they are shipped to the several places in the different places in the different states? A. Yes.

"Q. Direct from Elizabethtown, New Jersey, and South Bend, Indiana? A. Yes.

"Q. And when they are sold the contracts and leases are sent to Denver with the money? A. Sent to Denver each week, with the men's reports.

"Q. And then sent on to New York as you before stated? A. Yes, sir.

"Q. *Is this a constantly recurring process kept up during the year?* A. *Yes. It does not vary at all.*

* * * * * * * *

"Q. Are these notes or contracts or leases made payable in Denver? A. No; made payable at the store point. I will explain that. We have stores located at the most prominent towns, or most convenient towns, for looking after our business, and men are sent from the stores outside in the country and make reports to the store and turn in the leases to that store, and all the leases of the different men at that point are sent to the Denver agency each week.

* * * * * * * *

"Q. Do you keep a bank account here? A. Yes.

"Q. Do you remember the average monthly amount of deposits in the bank deposited by you during the year ending March 31, 1905? A. They averaged about $24,000.

"Q. What was the average monthly balance as shown by the bank books? A. $1,250.

"Q. What was the average monthly balance as shown by your own books? A. $1,071.

* * * * * * * *

"Q. Where did these several parties that owed the money on the leases and contracts—where did they reside? A. *Almost everywhere.*

"Q. *Well—in the states where the business was done?* A. *In the states where the business was done.*"

The witness then identifies and there was introduced in proof a copy of the return as made to the assessor by the plaintiff, with the exception of the $62,500 added by the assessor. He shows that one F. H. Roe was the agent of the plaintiff in charge of the plaintiff's office in Denver. He identifies Exhibit B as a notice received from the treasurer stating the amount due on taxes, and shows that to be $2,154.75. How much of this if any is interest, he does not state. After introducing this notice the questions and answers proceeded:

"Q. When was that notice received at your office? A. I cannot tell the actual date, but within a few days of the date of it.

"Q. Well, in what day and year? A. In January, 1906.

"Q. *Had you received any previous notice?* A. *Notice of what?*

"Q. *Of the increase?* A. *No.*"

In this connection the court will observe that there is no proof whatever to the effect that the assessor failed to mail to the plaintiff the notice of the increase. The only evidence on the question is that a subordinate clerk in the Denver agency received no notice of the increase. That he was such clerk will appear from the following cross-examination:

"Q. *What position did F. H. Roe hold at that time?* A. *He was the agent.*

"Q. *Was he in service under your direction, or were you under his control?* A. *I was under his.*"

The witness testified on cross-examination that the plaintiff had stores in Colorado at Denver, Colorado Springs, Pueblo, Trinidad, Leadville, Grand Junction, Boulder, Golden, Fort Collins, Alamosa, La Junta, and Canon City. From all of these stores money and written evidences of debt were received from week to week at the general agency. This, of course, included sales made in the City and County of Denver. Upon further cross-examination the witness testified that the plaintiff did not include any moneys that came from any of these stores in the return which it made to the assessor, nor did it include therein any of the notes or writings that came therefrom. The witness does not attempt to segregate the receipts so as to show the amount received, either in money or notes or leases, from collections and sales made in the City and County of Denver, from those made elsewhere, but testifies that they received in money for the year in question $297,000, while there were also received at said office during the same period of time notes and leases of the value of about $300,000. Some of the money received was on account of the particular contracts or leases executed within the same year, but the witness stated that he was unable to tell how much of the money was in payments on these particular notes and leases. The explanation of the witness will appear from the following questions and answers, propounded and elicited on cross-examination:

"Q. Mr. Stewart, what I want to know is this: How much money had been received and handled in your Denver office during this year, and then I want to know the amount of notes and other evidences of debt which you likewise handled during this year in

question. A. We received contracts and notes or leases aggregating about $300,000, and we received about $297,000 in cash. I cannot tell on what leases that money was paid.

"Q. What did you do with these notes and other evidences of debt when they were received? A. Checked them and forwarded them to the executive office in New York.

"Q. As they were paid, where were the payments made? A. The payments were made where the lease was drawn up or to the store.

"Q. From which the machine may have been purchased? A. Yes.

"Q. Then you are not able to state how much of the $297,000 was actually credited on the notes, etc., aggregating $300,000 and which you received during the year in question? A. No; I can not tell that.

"Q. How often did you make remittances of these notes to your home office as you designate? A Monthly.

"Q. And the cash you remitted weekly? A. Every Saturday.

"Q. In that way you remitted to the home office in the course of the year, in notes, leases, contracts and cash, the aggregate sum of about $597,000? A. Yes.

"Please read the question again.

"(Question read.)

"A. That meant less the expenses of the Denver office or other moneys paid out.

"Q. Then you didn't remit to the home office the whole of the money which you received? A. No. We paid the expenses of this office out of it.

"Q. Less the expenses of this office at Denver you remitted in notes and cash the aggregate sum of $597,000? A. Yes.

"Q. *Now in making this list for the assessor for the year in question you did not take into consideration this money and these notes about which you have just testified?* A. *No.*

"Q. Did you use Denver as a distributing point for any of your machines or other property? A. Yes; for points nearby.

"Q. For any points without the state? A. No.

"Q. Entirely within the state of Colorado? A. Yes.

"Q. In making this assessment for the year in question did you include in the list as prepared the machines which you had on hand in that way for distribution? A. I don't recall whether we had a warehouse then. In any event we made returns on the stock in Denver, whatever it may have been.

"Q. Did that include what you had in the Denver store, or did that include what you had in Denver for shipment to other points in other states? A. Well, I don't recollect whether we had a warehouse here or not."

Upon re-direct examination the following questions and answers were propounded and made:

"Q. Now you speak of the expenses of the Denver office. I would inquire whether you paid the freight on all these machines,—whether that was one of the expenses of the Denver office. A. We paid the freight on all carload shipments.

"Q. From the East? A. Yes; regardless of the point to which the machines go.

"Q. That is one of the expenses of the office? A. No; because we charge the store with it afterwards.

"Q. Well, that same money that you pay on freight you don't ship to New York? A. No.

"Q. Then that money comes out of the amount you send to New York—that money comes out of the remittance? A. That money comes out of the remittance we get from the stores.

"Q. So that reduces the amount which you receive from the stores? A. Yes.

"Q. *Now is there any way which you can tell, when you receive a lot of money from the stores or by which you can tell now—whether the money you received from the stores was collected on old leases or current leases?* A. *No; it is impossible to tell.*

* * * * * * * *

"Q. *Do I understand that the stores which made the leases and contracts collected the money on them?* A. *Yes.*"

If this means anything, it means that all notes and instruments of writing evidencing sales of machines in the City and County of Denver were made payable at that place. This fact should be connected with that allegation of the bill found on page 2 of the record, and above quoted, that "*notes and obligations are never returned to the agency at Denver except in individual instances, where such notes or obligations are required to assist in making collec-*

tions." In other words, the allegations of the bill, coupled with the testimony of the plaintiff's witness, conclusively show that the notes and instruments of writing taken in the City and County of Denver are sent to New York with the understanding that as it becomes necessary in the collection thereof they are to be returned to Denver. To what extent or how often they are returned the record does not disclose.

The re-cross-examination in part proceeded as follows:

"Q. You say the different stores were collecting all the while on leases. That means they were collecting on leases taken in previous years as well as on leases taken in the year in question? A. Certainly.

"Q. Was the title to all the machines sold during the year retained in your company? A. Yes; the machines were simply on leases.

"Q. The machines were not in fact sold, but simply leased to the individual who desired ultimately to become the owner of the machines? A. *Well in some cases we sold them on notes.*

"Q. *What is your custom?* A. *Both lease and notes.*

"(By Mr. Gilmore.)

"Q. And cash? A. And cash of course.

"Q. *Can you tell the value of the machines to which your company retained title and which were in the state of Colorado during the year in question?* A. *No; I cannot tell you that.*

"Q. *It amounted, however, to a large sum?* A. *Yes; it would be quite a sum.*

"Q. *Amounted to $100,000?* A. *I really can not say.*

"Q. *What was the value of the machines here in Denver to which you held title during that year?* A. *I could not say.*

"Q. *Well, did you pretend to include those machines to which you so held title*—A. *No.*

"Q. *In the return which you made? Is it not a fact, Mr. Stewart, that you had during the year in question machines scattered throughout the city and state which had been delivered in previous years, as well as those which were delivered within the year in question, and to which you still held title?* A. *We had machines out on lease.*

"Q. *And you do not pretend either in this account or in the account stated to include any of the machines in any of the returns that were made?* A. *We did not.*

"Q. *Can you approximate the value of the machines which you had in this condition during the year in question?* A. *No; I can not.*

"Q. *Well, would it amount to $300,000 in Colorado?* A. *I don't know. I would not say.*"

No other witness was introduced in behalf of the plaintiff, and the case was submitted on the pleadings and the testimony of Mr. Stewart. A decree was entered dismissing the bill. This appeal is from that decree.

III.

THE BILL, WHEN CONSIDERED ALONE OR IN CONNECTION WITH THE TESTIMONY, PRESENTS NO CASE WITHIN THE JURISDICTION OF A COURT OF EQUITY.

Giving to the allegations of the bill the strongest possible construction, we have at most an erroneous, irregular, or excessive assessment. No grounds for equitable relief can be gathered from the allegations of the bill. The failure to give notice of the increased assessment is the strongest allegation to be found in the bill, but that constitutes no basis for relief at the hands of a court of equity.

In State Railroad Tax Cases, 92 U. S., 575, a similar charge was made with respect to an increased assessment and the failure to give notice thereof. The Supreme Court of the United States, speaking through Mr. Justice Miller upon this phase of the case, said:

"It is charged that the board of equalization increased the estimates of values so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that, for want of this notice, the whole assessment of the property and levy of taxes is void.

"It is hard to believe that such a proposition can be seriously made. * * * "

Continuing, the court said:

"Let us suppose that the complaints made in these cases against the taxes were well founded; that the

mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation by municipalities; that the board of equalization increased the entire asessment on each company without sufficient evidence; in short, let us suppose that in these and many other respects the proceedings were faulty and illegal; does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether.

"We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several states and of the counties, cities and towns has resulted very naturally in a resort to every possible expedient to evade its force.

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor the injustice nor irregularity of themselves, give the right to an injunction in a court of equity. Moore v. Smedley, 6 Johns. Ch., 28; Dodd v. Hartford, 25 Conn., 239; Green v. Mumford, 5 R. I., 478; Messeck v. Columbia Co., 50 Barb., 190; Dows v. Chicago, 11 Wall., 108 (78 U. S., XX., 65); Hannewinkle v. Georgetown, 15 Wall., 548 (82 U. S., XXI., 232).

"The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all

taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, 14 Stat. at L., that 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' R. S., section 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See, Cheatham v. Norvell, decided at this term (ante, 561); Nichols v. U. S., 7 Wall., 122 (74 U. S., XIX., 125); Dows v. Chicago (supra).

"In this latter case, this court, after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of

interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has not adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.'

"So, in the case of Hannewinkle v. Georgetown (supra), the court says, 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax, can not be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

In the City of Milwaukee vs. Koeffler, 116 U. S., 219, the court had under consideration a case arising out of an alleged erroneous and unauthorized assessment on personal property. The plaintiff's personalty was assessed upon the theory that he was a resident of the city of Milwaukee. By his bill he alleged that he did not reside in that city during the year for which the assessment was made. For this reason he urged that the assessment was void. Mr. Justice Miller, speaking for the court, after referring to the well-known case of Dows vs. Chicago, said:

"It will be observed that in that case, as in this, the tax was resisted as a tax on the person on account of personal property, upon the ground *that the party assessed did not reside within the city*, and the corporation, therefore, had no power to tax him.

"The property for which the tax was assessed was in each case intangible property. In the first case it was bank shares, the certificates of which were undoubtedly held at the residence of Dows in New York; and in the present case it was for money loaned on mortgages.

"Looking at the case then made by the bill, one in which the assessment of the tax was not only irregular but void, the court, in the language of MR. JUSTICE FIELD, said:

" 'Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition.

There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments; and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived.' "

The general doctrine controlling the federal courts of equity is lucidly stated in *Union Pacific Railway Co. vs. Ryan*, 113 U. S., 506, by Mr. Justice Bradley, in the following language:

"It can not be denied that bills in equity to restrain the collection of taxes illegally imposed have

frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it has been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, can not of themselves furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed that he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court, as well as of many state courts."

In Pittsburg, C., C. & St. L. R. Co. vs. Board of Public Works, 172 U. S., 33, the above authorities and others were reviewed in an elaborate opinion by Mr. Justice Gray. The following language appears in the opinion:

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

See, also, Cruickshank vs. Bidwell, 176 U. S., 73, in which Mr. Chief Justice Fuller refers to numerous authorities on the question and defines the inadequacy of a remedy at law in the following language:

"Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury."

The whole question was again considered in the case of Indiana Manufacturing Co. vs. Koehne, 188 U. S., 681, in an opinion delivered by Mr. Justice Peckham. In that case the basis alleged for an appeal to equity was (1) that the assessment constituted a cloud upon title; (2) that there was no adequate remedy at law; (3) that a multiplicity of suits would be avoided; (4) that it would prevent irreparable injury.

After stating these grounds, the following language is used:

"It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."

The court then proceeds to a consideration of each of the grounds upon which the equity jurisdiction was invoked. We urge a careful consideration of the observations made by the Supreme Court under the four different heads above enumerated, and respectfully submit that what is there stated will conclusively demonstrate that the bill now under consideration is utterly without equity.

For the present, viewing the bill as alleging that no notice of the increased assessment was mailed by the assessor, still the appellant had an abundant remedy at law.

Section 5750 of the Colorado General Statutes of 1908 provides:

"In all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

The duty is thus imposed on the board of county commissioners to make a refund if the assessment is erroneous. If the refund is not made on demand, an action may be instituted at law to collect the amount of the erroneous tax. It is true that the Supreme Court of Colorado has held that an application to the board of county commissioners for a refund is a condition precedent to the right to institute an action at law for the recovery of the erroneous tax. This rule may or may not be recognized by the federal court, but if the demand for the refund at the hands of the board of county commissioners should be held as a prerequisite to the right to maintain an action in the United States Circuit Court, that fact could in no respect render less effective the remedy which the law affords. A debt payable on demand may not be the basis of an action to recover a common-law judgment therefor, until a demand for payment has been made. The fact that the demand must be made, however, in no respect detracts from the efficiency of the legal remedy for the collection of the debt.

This, it seems to us, affords a complete answer to the suggestion that the legal remedy, which precludes resort to a court of equity, must be one existing in and enforcible by the federal courts. The appellant being a non-resident, and erroneously assessed for taxes in a sum exceeding $2,000, may pay the taxes, demand a refund, and, if the demand is refused, institute an action in the United States Circuit Court for the recovery thereof.

We have taken this much pains to show that for any wrong complained of by appellant it had, and has, a legal remedy in the federal courts. We submit,

however, that under the ruling in the case of Indiana Manufacturing Co. vs. Koehne, 188 U. S., *supra*, it does not devolve upon us to show that the legal remedy exists by appeal to those courts. Under this authority it is sufficient if, under the law of the state, special tribunals have been erected for the redress of the grievance, or provision made for relief by appeal to the state courts. In that case a statute not different in character from those in Colorado provided for the redress of grievances on account of alleged erroneous assessments for taxation, and, referring to such statutes, Mr. Justice Peckham in the case just cited, remarks:

"The remedy thereby provided being sufficient, we hold that complainant had an adequate remedy at law."

The language of section 5750, Colorado Revised Statutes, *supra*, is substantially, if not precisely, the same as that found in section 3777, 2 Mills.

That this statute affords a method of obtaining relief after the payment of taxes, so as to preclude the jurisdiction of a court of equity to enjoin the collection of the tax, was expressly ruled by the Supreme Court of Colorado in *Hallett vs. Arapahoe County*, 40 Colo., 308, where the court, speaking at page 318, said:

"By section 3777, 2 Mills' Ann. Stat., it is provided that taxes paid, which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate."

Section 5670 of the Colorado Revised Statutes of 1908 expressly makes it the duty of the assessor to assess any taxable property which the owner has omitted from his return. When such an assessment has been made, the presumption is that the assessing officer discharged his duty. Such has been the express construction of that statute by the Supreme Court of Colorado.

> Singer Sewing Machine Co. of New Jersey vs. City and County of Denver, 103 Pac. Rep., 294.

We have treated the case thus far as if there had been a failure on the part of the assessing officer to mail a notice of the increased assessment. The testimony, however, does not support the allegations of the bill in this respect. The evidence is that a clerk, the subordinate of the man who had charge of the Denver agency, did not receive such notice. Whether the notice was mailed to or received by the appellant at its office in New York or New Jersey does not appear. Neither does it appear from the testimony that the notice was not mailed to or received by the agent in charge of the Denver office. It follows, therefore, on account of the failure of the testimony in this respect, that the assessing officer is shown to be derelict in no respect whatever.

Moreover, there is no threatened action on the part of the tax collector showing any impending danger. The allegation of the bill is that the treasurer threatens by a letter addressed to the plaintiff to proceed to collect the unpaid taxes by the seizure and sale of the plaintiff's personal property. Treating this allegation as true, it constitutes no ground for

an injunction. In the absence of a showing that there is some peculiar or unusual intrinsic value attaching to the personal property about to be seized, an injunction will not lie to restrain its seizure. (Odlin vs. Woodruff, 31 Fla., 160; 22 L. R. A., 609.) In the last-named report, a multitude of authorities are cited in a note from both state and federal courts in support of this well-known doctrine. In the opinion the following language is used:

"That the court of equity has no jurisdiction to interfere by injunction to restrain trespass upon personal property, except in rare cases, where the property trespassed upon or taken has some peculiar or intrinsic value to the owner that could not be compensated in money; and that the remedy is at law, is well settled in this state as elsewhere."

But even this allegation, though utterly insufficient if true, is not supported by the testimony. The letter itself mentioned in the bill was introduced in evidence as appellant's Exhibit B, and may be found at pages 40 and 41 of the printed record. We have carefully examined this exhibit, and fail to find any such threat as that by the bill attempted to be alleged. The strongest statement in the letter is the following:

"Your personal tax for the year 1905, amounting to 2284.05, is delinquent, and unless paid at once, I will be obliged to enforce collection of same according to law."

There is no allegation anywhere in the bill that the plaintiff, at the time this letter was received, held

in the City and County of Denver any personal or other property which it was possible for the treasurer to distrain. It expressly appears from the bill that the property assessed has been removed from the State of Colorado. The declaration, therefore, on the part of the treasurer, that he would be obliged to enforce collection of the tax according to law must refer to the institution of legal proceedings for the collection of the tax, such as is authorized by section 5677 of the Colorado Revised Statutes of 1908. This statute is as follows:

"All taxes levied or assessed upon personal property of any kind whatsoever shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid; and if such property so taxed, or any part thereof, shall have been removed from the county wherein the same was taxed, or the treasurer can not find or obtain the same or other property sufficient for the satisfaction of the tax, with interest, penalties and charges, then the county treasurer shall sue the person so taxed, before some court of his county having jurisdiction; and upon the trial of any such cause the tax roll or a certificate from the county treasurer of the amount of such tax, and that the same is not paid, shall be prima facie evidence that the amount claimed is due and unpaid, and judgment shall be given for the amount of such tax, together with all costs, interest and charges thereon and execution therefor shall issue as in other cases, from which execution and sale there shall be allowed no exemption except such property as is exempt from taxation by this act."

Certainly the doctrine is true that a taxpayer who seeks an injunction against the collection of taxes must make a clear and unequivocal case. If the contemplated action on the part of the treasurer was to sue for the tax, that would have rendered it possible for the plaintiff by its defense to raise any objection in respect to the validity of the assessment. If such an action had been started by the tax collector in the state court against the appellant, a non-resident corporation, for a sum in excess of $2,000, exclusive of interest and cost, the action would have been subject, at the option of appellant, to removal to the United States Circuit Court. In such an action the appellant could have defended on the ground that the property assessed was not subject to taxation.

Still again, if the appellant's personal property had actually been seized by the tax collector, it had a legal remedy by action in the United States Circuit Court as well as in the state courts for its recovery from the custody of the tax collector. In such an action it would have been possible for the court of law to have adjudicated and determined all questions in relation to the alleged erroneous assessment. If it be urged that the immediate delivery of the property could not have been procured in such an action, in view of section 80 of the Colorado Code requiring an affidavit that the property had not been taken for a tax, still the legal remedy would have been adequate. Nothing appears in this bill or the testimony which shows that any property would have been seized, or could have been seized, the mere seizure and holding of which, pending a common-law action for its recovery, would have constituted any irreparable injury or

damage. However, if appellant's contention is true, the affidavit required by section 80 of the Code could have been truthfully made. If the personal estate of whose assessment complaint is made was not subject to taxation under the statutes of Colorado, then any personal property owned by the appellant would have been exempt from seizure on account of such tax. But this phase of the case need not be further pursued. The action for the recovery of the property at the end of the litigation, without immediate delivery, afforded an ample legal remedy. This is particularly true in the absence of any showing in respect to the insolvency of the defendant and in the absence of any allegation in respect to the character of the property whose seizure may have been apprehended.

For all of these reasons it abundantly appears that the appellant had divers adequate and complete legal remedies for any wrong which it may have suffered, both in the federal and state courts.

The bill is defective for still another reason. The necessary jurisdictional averment is not made. It alleges that more than $2,000 is in controversy. This does not meet the requirement of the statute, which in suits of this character requires that the amount in controversy, *exclusive of interest and cost*, shall be more than $2,000. For this reason alone the bill was properly dismissed.

IV.

THE ASSESSMENT WAS MADE UPON PROPERTY USED IN CARRYING ON A BUSINESS IN THE CITY AND COUNTY OF DENVER, AND FOR THIS REASON SAID PROPERTY WAS SUBJECT TO TAXATION.

Section 10, Article X, of the Constitution of the State of Colorado, reads as follows:

"All corporations in this state, or doing business therein, shall be subject to taxation for city, county, school, municipal and other purposes, on the real and personal property owned or used by them, within the territorial limits of the authority levying the tax."

In conformity with this constitutional provision, the legislature, in section 5544, Revised Statutes, declared:

"The moneys of non-residents, kept and used, loaned and invested within the state for profit, shall be subject to taxation in like manner as the moneys, credits and effects of persons domiciled within the state."

Article X of the Constitution provides what property may be exempt from taxation in this state, and that is reiterated by the legislature in section 5544 of the Revised Statutes.

A reference to these constitutional and statutory provisions will disclose that the exemption laws have no application to any of the property assessed in the suit at bar.

Section 5540, Revised Statutes, after defining the terms "real estate" and "improvements," proceeds as follows:

"The term 'personal property' includes everything which is subject of ownership, whether tangible or intangible, and not included within the term 'real estate.'

"The term 'credit' includes every claim and demand for money, labor or other valuable thing, and every annuity or sum of money receivable at stated periods; but pensions from the United States and salaries and payments expected for services to be rendered are not included in the above term.

"The term 'intangible property' shall include rights, credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights having a value for the purposes of income or sale of itself, or in connection with other property."

That it was made the duty of the legislature to provide for the taxation of the property owned by a non-resident person or corporation, but invested or used in a business carried on within the State of Colorado, is obvious from the constitutional mandate above set forth. That the legislature intended to and did obey that mandate in the enactment of the law above set forth, is equally obvious.

If, then, the complainant is carrying on a business in the City and County of Denver, in which it has money invested, it cannot possibly escape taxation on the money so invested, by having either the money or

the evidence of the right to the money carried into another jurisdiction.

The money so invested and the evidence of the right thereto were omitted in the tax return made by appellant.

It thereupon became the duty of the assessor to assess against the complainant any property owned, used, or invested by it in the City and County of Denver, and not included in the schedule returned by the complainant. (Revised Statutes, 5670, *supra.*)

Hallett vs. Arapahoe County, 40 Colo., 308.

City and County of Denver vs. Hallett, 100 Pac., 408.

Singer Sewing Machine Co. of New Jersey vs. City and County of Denver, 103 Pac., 294.

In the last-named case the Supreme Court of Colorado held not only that it was the duty of the assessor to add to the tax schedule any omitted property, but also that in doing so the burden was thrown upon the taxpayer to show that error was thereby committed. We assume that that rule will be recognized by this court.

That there was an utter failure on the part of the complainant to show any error in the assessment becomes apparent by mere reference to the testimony itself. The complainant's managing agent admits that in years past sewing machines have been placed with different persons in the City and County of Denver, the title to some of which is still retained by the complainant. Whether the machines so placed are of the value of $100,000, $300,000, a greater sum or a less

sum, the witness professes ignorance. In the face of such testimony, the presumption existing in favor of the assessor's action must prevail.

Writings in the form of evidences of debt were executed by persons who purchased machines. These writings were an incident to the business carried on in this city. It is true they are sent to the State of New York from month to month, but not for the purpose of being used at that place. In this connection it will be noted that they were not sent to the state in which the appellant was organized. They might as well have been placed in a safe at some point in the State of Kansas. The mere fact that they were lodged for safe-keeping in a state other than that in which they constitute a part of the business carried on by the appellant does not and cannot affect or change their situs for the purposes of taxation. *There is no pretense that these credits are subject to taxation in the State of New York.*

In these circumstances, that Colorado, and not New York, is the taxing jurisdiction, so far as these credits are concerned, is established by the decision of the Supreme Court of the United States in the case of *Buck vs. Beach*, 206 U. S., 392. In this case notes were executed and made payable in the State of Ohio by residents of that state to a man by the name of Nash, who was a resident of the State of New York. These notes were for loans of money made in the State of Ohio through an agent of Nash in that state. After these notes had been executed, it seems that they were sent to another agent of Nash in the State of Indiana, ostensibly for safe-keeping, but no doubt with the real motive of thereby evading taxation on ac-

count of said notes in the State of Ohio. They were assessed in the State of Indiana, and the question involved was as to the validity of that assessment. The court, in a statement of the case, said:

"James Buck was the agent of decedent at Lafayette, in the state of Indiana, for many years preceding the death of Mr. Nash. The Ohio notes were sent to him from Cincinnati by the agent there, during the years in question, together with the mortgages securing the payment of the notes, and they were kept in a safe at Lafayette, Indiana, by Mr. Buck, but no business was transacted in regard to them nor any use made of them in Indiana, otherwise than that a short time before the interest on or principal of the notes became due they were sent to the Ohio agent to have the interest payments made to him endorsed upon them, or to be delivered up if the principal were paid. Nothing else was done in Indiana in regard to the notes, except that a few days prior to the 1st day of April in each year (which is the day upon which assessments for taxes are, by law, made in the state of Indiana) Mr. Buck sent the notes and mortgages to the Ohio agent, and a few days subsequent to that day in each year the same were returned by the Ohio agent to Mr. Buck, who retained them in his possession."

And in the opinion the court uses the following language:

"The sole question, then, for this court, is whether the mere presence of the notes in Indiana constituted the debts of which the notes were written evidence properly within the jurisdiction of that state, so that

such debts could be therein taxed. Generally, property, in order to be the subject of taxation, must be within the jurisdiction of the power assuming to tax. * * * In regard to tangible property the old rule was *mobilia sequuntur personam,* by which personal property was supposed to follow the person of its owner, and to be subject to the law of the owner's domicile. For the purpose of taxation, however, it has long been held that personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax. *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S., 18; *Tappan v. Merchants Nat. Bank,* 19 Wall., 490; *People ex rel. Hoyt v. Tax & A. Comrs.,* 23 N. Y., 224, 240. The same rule applies to intangible property. Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicile of the creditor and within the jurisdiction of the state where he has such domicile. It is property within that state. Thus it has been held that a debt owned by a citizen of one state against a citizen of another state, and evidenced by the bond of the debtor, secured by a deed of trust or mortgage upon real estate where the debtor resides, is properly taxed by the state of the residence of the creditor, if the statute of that state so provides, and such tax violates no provision of the federal constitution. *Kirtland v. Hotchkiss,* 100 U. S., 491."

Referring then to the decision of the Supreme Court of Indiana, which appeared to find that the

notes were sent to the State of Indiana to avoid taxation either in Ohio or New York, the court continues:

"But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana which really lies outside and beyond the jurisdiction of that state. Jurisdiction of the state of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the state of Indiana these evidences of debts owing him by residents of Ohio. The question still remains: Was there any property within the jurisdiction of the State of Indiana, so as to permit that state to tax it, simply because of the presence of the Ohio notes in that state? It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that state. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves, although they were only written evidence of the existence of the debts which were in fact thereby taxed."

Then, considering numerous authorities, especially that of *Metropolitan Life Ins. Co. vs. New Orleans*, to which we shall refer later, the court continues:

"The temporary absence of the notes given for the loans from the state (being in New York, the domicil of the company) except when they became due was re-

garded as unimportant. The law, it was said, regarded the place of their origin as their true home, to which they would return to be paid, and their temporary absence, however long continued, was left out of account."

It is perfectly plain from the opinion of the Supreme Court in the case under consideration, that the notes were properly subject to taxation, if the statutes of the State of Ohio so provided, in that jurisdiction.

So we say with respect to the credits involved in the assessment here; their execution was the result of the business carried on here; they are made payable here; they are sent out of the State of New York into the state for no conceivable purpose, except with the hope of rendering them secure from taxation at any place. They are returned when necessary, for the purposes of collection; they are paid at the place of their execution; they are never paid in the State of New York. Just as the Ohio notes, in the case above discussed, were properly subject to taxation in the State of Ohio, but were not properly subject to taxation in the State of Indiana, the credits involved in this proceeding are properly the subject of taxation in the State of Colorado, and are not subject to taxation in the State of New York. Even if the old fiction should prevail, the situs of these notes would be in the State of New Jersey.

The facts thus bring the case clearly within the doctrine announced by the Supreme Court of the United States in the case of *Metropolitan Life Ins. Co. vs. New Orleans*, 205 U. S., 393.

In this case, the Metropolitan Life Insurance Company of New York had an agent in the State of Louisiana, through whom loans were made to citizens of that state, who were policy-holders of the company. The scheme, as stated in the opinion of the Supreme Court, for the conduct of the business, was as follows:

"The policy holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan a desirable one, he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan, the company forwarded to the agent a check for the amount, with a note, to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the endorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not *eo nomine* on these notes, but was expressed to be on 'credits, money loaned, bills receivable,' etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment."

We respectfully submit that there is no substantial difference in the scheme of business conduct thus set forth and that conducted by appellant in Denver. The court then refers to the Louisiana taxation laws —substantially the same, we think, as those of Colorado—and continues:

"The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the state. It requires that in the valuation for the purposes of taxation of the property of mercantile firms, the stock, goods and credits shall be taken into account, to the end that the average capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the state and to the citizens of other states or countries doing business, personally or through agents, within the state of Louisiana. To accomplish this result, the law expressly provides that all bills receivable, obligations, or credits arising from the business done in this state shall be assessable at the business domicil of the resident. Thus it is clear that the measure of the taxation designed by the law is the fair average of the capital employed in the business. Cash and credits and bills receivable are to be taken into account merely because they represent the capital, and are not to be omitted because their owner happens to have a domicil in another state. * * * The tax was levied in obedience to the law of the state, and the only question here is whether there is anything in the constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the state. Property situated without

that jurisdiction is beyond the state's taxing power, and the exaction of a tax upon it is in violation of the 14th amendment to the constitution. *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S., 513; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S., 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194. But personal property may be taxed in its permanent abiding place, although the domicil of the owner is elsewhere. It is usually easy to determine the taxable situs of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated not only by the fiction that the domicil of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts have assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the mere representative of it, and may have a taxable situs of their own. How far promissory notes are assimilated to specialties in respect of this doctrine need not now be considered.

"The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have been twice considered here, and assessments upon credits arising out of investments in the state have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a non-resident, who had inherited them, left them in Louisana in the possession of an agent, who collected the principal and interest as they became due. *New Orleans v. Stempel*, 175 U. S., 309. Again, it was held that where

a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana. *State Assessors v. Comptoir National D'Escompte*, 191 U. S., 388. In both of these cases the written evidences of the credits were continuously present in the state, and their presence was clearly the dominant factor in the decisions. Here the notes, though present in the state at all times when they were needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicil. Between these two decisions came the case of *Bristol v. Washington County*, 177 U. S., 133. It appeared in that case that a resident of New York was engaged, through an agent, in the business of lending money in Minnesota, secured by mortgages on real property. The notes were made to the order of the non-resident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest, and received payment. The property thus invested continued to be taxed without protest in Minnesota until finally the course of business was changed by sending the notes to the domicil of the owner in New York, where they were kept by her. Mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied

after this change in the business were in dispute in the case. In delivering the opinion of the court, Mr. Chief Justice Fuller said:

" 'Nevertheless, the business of loaning money through the agency in Minnesota was continued during all these years, just as it had been carried on before, and we agree with the circuit court, that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes, as expounded in the decision to which we have referred.'

"Referring to the case of New Orleans v. Stempel, the chief justice said:

" 'There the money, notes and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

" 'Persons are not permitted to avail themselves, for their own benefit, of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public need, through action of this sort, whether taken for convenience or by design.' "

"Accordingly it was held that the tax was not forbidden by the federal constitution.

"In this case the controlling consideration was the presence in the state of the capital employed in

the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the Bristol case. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long-continued, though not permanent absence, can not have the effect of releasing them as the representatives of investments in business in the state from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicil of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. Blackstone v. Miller, 188 U. S., 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this,

and that the foreigner doing business can not escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances they have a taxable situs in the state of their origin."

So we say with respect to the suit at the bar; we are not dealing with a single credit, or a series of separate credits, but with a business which has been carried on for years.

A similar question was again before the Supreme Court of the United States in the case of People of the State of New York vs. Wells, 208 U. S., 14. In this case the relator was a corporation organized under thke laws of the Kingdom of Great Britain and Ireland. It procured a certificate authorizing it to do business in the State of New York as an importer. It kept a warehouse and offices in the borough of Manhattan. To this place it sent its products from Ireland, in unbroken original packages, to be sold. After reserving the necessary amount for paying the expenses of the business conducted in the city of New York, the agent remitted the proceeds of the goods to the main office of the company at Dublin. The greater part of the cash on hand and in bank was continually in process of transmission to the main office, the bank account being kept in New York merely or essentially for the purpose of paying the duties on the goods shipped, and other incidental expenses in New York. It was admitted that the amount invested in business in the State of New York was $797.68. The assessment, however, was fixed at $94,600, which was approximately the aggregate value of the amount receivable on notes and open

accounts, safes, fixtures and furniture in the State of New York, cash on hand and in bank, less the amount of certain bills payable.

The right to tax was attacked both upon the ground that the property assessed was the proceeds of the sale of imports, and upon the theory that the property had no taxable situs in the State of New York. In the discussion of the last-named question the court used the following language:

"The power of the state of New York to impose a tax upon the cash and these notes as capital employed in a business within the state, laying aside for the moment the question as to their character as proceeds of the sale of imports, can not be doubted, in view of the previous decisions of this court. Particularly the recent case of *Metropolitan Life Ins. Co. v. New Orleans*, decided at the last term (205 U. S., 395, wherein it was held that those engaged in the business of lending money in a state, being non-residents of the same, might be taxed upon the capital employed in such business, precisely as the state could tax the capital of its own citizens.

"The constitutional protection, as we have seen, is intended to secure the right to bring in, and to sell in the original packages, the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied; and the decision in *Brown v. Maryland* recognizes that the importer may lose this right of protection by mingling such goods with other property, and altering their character as importations in original packages, and making them by his conduct subject to the taxing power of the state. And we think

the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.

"And we think such a case is presented in the facts now before us. The plaintiffs in error have established a warehouse and place of business in the state of New York for the sale of their imported goods. This business is of a permanent character; the goods are constantly received and sold and replaced by other goods. Cash is deposited in bank in New York, and is subject to use as the needs of the business may require. In this business it takes notes for sales of such goods. These notes are not directly transmitted to its home office in Dublin, but are held for collection in connection with the business in New York; and while the bulk of the proceeds may be sent abroad, sufficient sums are retained to meet the expenses of the business and pay duties on subsequent importations of goods."

This last paragraph seems to be absolutely conclusive of the question involved in the suit at bar. The appellant has established a warehouse and place of business in the City and County of Denver for the sale of its goods. This business is of a permanent character. The goods are constantly received and sold, and replaced by other goods. Cash is deposited in bank in Denver, and is subject to use, as the needs of the business in Denver may require. In this business it takes leases and other evidences of debt on account of the leases and sales of its goods. These

obligations are never transmitted to the home office of the complainant in the State of New Jersey, but are temporarily placed for deposit or safe-keeping with an agent in the State of New York. They are collected in Denver, to which place, when necessary for that purpose, the notes are returned. They are collected in connection with the business in Denver, and while the bulk of the money and proceeds may be sent to New York, sufficient sums are retained in Denver to meet the expenses of the business at that place.

The only possible difference between the suit at bar and the case just being discussed is that the evidences of debt in that case were never sent out of the State of New York, but were retained there until collected, while in the suit at bar the notes were temporarily sent to the State of New York, but to be returned when necessary for the purpose of collection. Now, under the authority of *Buck vs. Beach, supra,* the mere transmission of the notes out of the state in which they were executed, and where they are made payable, in no respect affects their situs for the purpose of taxation. That being true, the suit at bar must be treated precisely as if the credits were not sent to New York at all. The act of transmitting them to New York is utterly without effect. Doing so would not authorize the authorities in New York to tax them, and doing so does not take away the power of the taxing authorities in Colorado to assess and tax them.

It is unnecessary to enter upon a discussion of the question as to whether the written evidences of debt received at the Denver agency from the subagencies in states and territories other than Colorado are subject

to taxation in the City and County of Denver. Nor, indeed, is it necessary to discuss the question as to whether such written evidences of debt received at the Denver agency from the subagencies located elsewhere in the State of Colorado are properly subject to taxation in Denver, rather than in the county of the subagency. For the purposes of this suit we may waive both of these questions. We simply maintain that the local authorities in the City and County of Denver under the statutes of Colorado are authorized to assess for taxation the written evidences of debt executed and made payable within the City and County of Denver on account of machines sold at that place, and that any sewing machines, the title to which is held by the appellant, and which have their actual situs in the City and County of Denver, are also subject to assessment for taxation at that place. The utter ignorance of the witness introduced on behalf of the plaintiff as to the value of the notes and credits so executed and made payable in Denver renders it obvious that the assessor made no mistake of which the appellant can complain in fixing the value of such notes and credits at $60,000. It is equally obvious that the assessor was exceedingly liberal to the appellant when he fixed the value of "other property" at $2,500. No one who reads this record can for a moment doubt that the actual value of sewing machines in Denver to which the appellant retains title would many times over exceed this insignificant item. Neither of these classes of property—that is, written evidences of debt taken and made payable in Denver for machines sold in Denver and sewing machines having an actual location in the City and County of Denver, and to which

the appellant retains title—is included in the return made by the appellant to the assessor. Both classes were, therefore, omitted from the return. The assessor merely performed his duty when, treating them as omitted property, he made the most accurate assessment of which he was capable.

Since the decree in this case was rendered by the United States Circuit Court of Appeals, the case of Liverpool & London & Globe Insurance Co. vs. Board of Assessors for the Parish of Orleans, reported in 221 U. S., pages 346-357, has been decided. This case was decided on error to the Supreme Court of the State of Louisiana. On page 350 of the opinion it is said:

"The assessment was laid under Act 170 of 1898. Section 1 of this act in defining property subject to taxation includes 'all rights, credits, bonds and securities of all kinds; promissory notes, open accounts, and other obligations * * * and all movable and immovable, corporeal and incorporeal articles or things of value, owned and held and controlled within the State of Louisiana by any person in any capacity whatsoever.' Section 7 makes it the duty of the tax assessors to place upon the assessment list all property subject to taxation, and provides as follows:

" 'Provided further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average of the capital, both cash and credit, employed in the business of the party or parties to be assessed. *And this shall apply with*

equal force to any person or persons representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicile of said non-resident, his agent or representative.' "

After discussing the said statute, and a number of other cases of a similar nature to that under consideration here, the Supreme Court, on pages 356 and 357, concluded by saying:

"But, as we have seen, the jurisdiction of the State of his domicile, over the creditor's person, does not exclude the power of another State in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter State rests upon considerations which are more fundamental than that notes have been given, or that the credits are evidenced in any particular manner, was clearly brought out in the concluding statement of the opinion in the case of the *Metropolitan Life Insurance Co.* (115 La. 708) supra. There the court said:

" 'Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the

situs of the latter can be allowed to obscure the truth. Blackstone vs. Miller, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidence of credits in the form of notes. Under such circumstances they have a taxable situs in the State of their origin.'

"Equally, then, had the State the power to tax the premium accounts here involved. They were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits arising in the local business.

"It is also urged that the assessment was excessive. This question was not suitably presented in the state court, for the suit was brought for the cancellation of the entire assessment upon the ground, as a whole, it was without warrant of law, or if within the statute was beyond the power of the legislature

to authorize. It is said that so far as the assessment was in excess of the actual credits it was a nullity, as one of property not in existence. The subject of the assessment, however, was a class of credits which was within the taxing power and the question is one of amount. Proper opportunity was afforded for its correction if it was too great; and if the plaintiff in error had seasonably sought a reduction, availing itself of the remedy that was open to it under the state law, it could have obtained appropriate relief. *Orient Insurance Co. vs. Board of Assessors, 124 La. 872.* In no aspect of the case, can it be said that there was want of due process of law."

In view of the fact that the case just quoted from has been decided since the decree in this case was rendered by the Circuit Court of Appeals, and that it is based upon a statute similar to that in force in the State of Colorado by virtue of which the assessment here involved was levied, we feel that it is conclusive of the right of the State of Colorado to levy such an assessment as is sought to be enjoined in this cause.

Counsel seeks to show that appellant has no adequate remedy at law for a redress of the grievances of which it complains. We discussed this question in the second division of our brief. If any announcement by this court, when properly construed, holds that the remedy at law must be one enforcible in the federal courts, then we have shown how, under the circumstances of this particular case, that particular remedy exists.

It is difficult to appreciate the force of the suggestion that the money, notes, and credits used in the

prosecution of the business in Denver were not within the issues of this case. The bill affirmatively discloses that it was the purpose of the appellees to assess and tax this sort of property. It was unnecessary for the answer to make any affirmative allegation upon this question. We have already shown the utter failure of the appellant to establish any error on the part of the assessing officer in estimating the value of the money, notes, and credits at $60,000. So far as the item of $2,500 is concerned, which was assessed for the purpose of covering other property, it was sufficient if the proof disclosed the existence of other property of that value. Whether the other property is the form of sewing machines, to which the appellant held title, or is additional credits, is wholly immaterial.

Counsel's entire argument is based upon the theory that the appellant could avoid the effect of the Colorado taxation laws by sending its money and evidences of debt out of the state. Because this was done, it is urged that such money and credits were not *kept* and *used* in the Denver business. Machines are bought and sent to Denver for sale. They are sold there for cash or upon credit. In the latter event, evidences of debt are taken. The cash received on account of the cash sales and the money paid on account of the evidences of debt, from week to week or month to month, are all sent to the Denver office. The money so received at the Denver office, after paying the agency expenses, is forwarded to New York; the evidences of debt are likewise forwarded. As the business requires, other machines are bought and sent to Denver, and these in turn are sold, either for cash or on credit. This business, as counsel has put it, is a recurring

process; and yet, forsooth, because the payment for these machines is made from New York with money sent from the Denver agency, instead of being made directly from the Denver agency, he would have the court hold that said money and credits are not used in the Denver business. A court, and particularly a court of equity, will look behind these forms. It will recognize an established business conducted in Denver for the sale of sewing machines for cash and on credit in that county. *(Metropolitan Life Ins. Co. vs. New Orleans, supra.)* Cash received from sales in that county, and evidences of debt received on account of sales of machines in that county, are a part of this Denver business. This fact cannot be changed by sending to another county or to another state the money and evidences of debt so received. Transmitting the notes to New York until such time as they are needed for collection in Denver cannot possibly change their taxable situs. Their situs is either in New Jersey, the domicile of the appellant, or in Denver, where the money and notes were received from the local business and where the notes are made payable, and to which place, as becomes necessary for their collection, they are returned. If the fiction once prevailing, and still prevailing in some instances, that personal estate can have no situs except that of its owner, applies, then the situs of this money and these credits is in the State of New Jersey. If this fiction yields to the fact, the situs of both the money and credits is in Denver, and no act of the appellant in transmitting this money and these credits to New York or elsewhere can in any respect change this situs. Sending them to New York is as ineffectual in this respect as if they

had been shipped to the North Pole. Shipping them out of Colorado to any other point on the face of the earth, other than to the domicile of the appellant, has no legal effect as to the taxable situs of this money and these evidences of debt. For that matter, the Colorado taxation laws could not have been avoided, in the circumstances of this case, by shipping them into New Jersey. The fact, therefore, that they were shipped to New York may be entirely eliminated. That fact has no bearing whatever on the questions involved in this controversy.

With the proposition, urged at some length by counsel, that the appellant, a New Jersey corporation, cannot inhabit any other state than the State of New Jersey, we have no controversy. Let it be conceded that the appellant does inhabit the State of New Jersey. Still, through an agent or agency it conducts a business in Denver. Conducting the business in Denver, however, does not change its habitat. We have never urged such a proposition. Nor does the fact that it has its agent ship to New York money and credits received from the Denver business in any respect change the place of its habitation. This again shows how utterly immaterial is the fact that said money and credits are shipped to New York.

No useful purpose can be subserved by a review of those authorities involving such questions as those discussed in *State Tax on Foreign Held Bonds*. They are utterly without application in this suit. Neither is it necessary to consume the time of the court in the consideration of those cases announcing the general rule that the situs of personal property is that of the owner. That this general rule has its exceptions

counsel recognizes, and he has the goodness and fairness to cite authorities declaring some of the exceptions. One of the exceptions to this general rule applies in those cases where a non-resident through an agent or agency conducts an established business in another state. Under such circumstances the assets of that business, whether in the form of money, notes or credits, or other personal property, may be subject to taxation at the option of the legislature of the state in which the business is conducted. The State of Colorado has seen proper, in obedience to the mandate of the state Constitution, to impose a tax on such assets used in the conduct of a business, although the owner be a non-resident. That such business is conducted and carried on in Denver is too plain to admit of debate. It results, under the authorities cited in the third division of our brief, that the tax complained of was properly and lawfully imposed.

The suggestion that any question of interstate commerce is involved is too patently absurd to admit of more than a passing notice. This New Jersey corporation has a store in Denver. Throughout the County of Denver machines are sold, not in bulk or original packages, but as single machines or parts of machines, as the case may be. No question of interstate commerce is involved in this record.

Brown vs. Maryland, 12 Wheat., 419.
People ex rel. vs. Wells, 208 U. S., *supra*.

We have already discussed the question in respect to the allegation that the assessment was raised without notice being mailed. We have shown the failure to establish this allegation by the testimony.

But even if the allegation had been established, we have already shown that the only possible effect thereof was to deprive the appellant of one out of many legal remedies existing in its favor. The fact that it must now pay the tax and sue for a refund, instead of applying to the assessor for relief and appealing from his action to the District Court of the state on condition that it first pay the taxes, cannot be construed as material to the present issues.

General Statutes of Colorado, sec. 5641.

It amounts to the same thing. In either event a review of the assessment may be made by the state District and Supreme Courts. In view of this condition, it is also useless to review the authorities which discuss the question of notice. So far as this record is concerned, the notice was given; but if it was not given, the appellant has a remedy no less adequate than would have existed if the notice had been received.

We are not unmindful of the doctrine announced in *Atchison, Topeka & Santa Fe Railway Company vs. Sullivan,* 173 Fed., 456, and the cases therein cited, to the effect that a court of equity may acquire jurisdiction to enjoin the collection of taxes, where it appears that the assessment was made in conformity with a systematic, intentional, and continuing scheme, which inevitably results in injustice to and discrimination against the complaining taxpayer. We respectfully submit, however, that there is not one fact in this record which in any respect renders applicable that doctrine.

We have discussed these various questions with a full understanding that this court will not—and, under the rules so repeatedly announced by it, cannot—consider any of them. Nevertheless, we deemed it, at least, not improper to show that the decree appealed from is a righteous one. If the merits were considered, it would have to be affirmed.

Respectfully submitted,

W. H. BRYANT,

J. A. MARSH,

Solicitors for Appellees.

SINGER SEWING MACHINE COMPANY OF NEW JERSEY v. BENEDICT, TREASURER, &c. OF DENVER, COLORADO.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 289. Argued May 5, 1913.—Decided June 9, 1913.

Under § 723, Rev. Stat., a bill in equity does not lie in the courts of the United States where a plain, adequate and complete remedy can be had at law.

Where it is obvious that there is a remedy at law, it is the duty of the court to interpose that objection *sua sponte* to a suit in equity.

Where, as in this case, there has been no waiver on the part of the defendant, the objection is available in the appellate court.

The illegality or unconstitutionality of a state or municipal tax is not itself a ground for equitable relief in the Federal courts. *Boise Water Co.* v. *Boise City*, 213 U. S. 276.

The state courts cannot define the equity jurisdiction of the Federal courts; but where the state courts have held that a suit in equity could be maintained in the courts of the state, the same suit can be maintained in the Federal court having jurisdiction in other respects.

In Colorado one paying an illegal tax has a remedy at law to recover it back, and the fact that the tax list is *prima facie* evidence of the amount due does not make it conclusive.

The fraud, accident or mistake necessary to justify an equitable action to enjoin the collection of a tax must be more than mere illegality.

179 Fed. Rep. 628, affirmed.

THE facts, which involve the construction of § 723, Rev. Stat., and the right to maintain a bill in equity to restrain the collection of taxes where the taxpayer has a plain and adequate remedy at law, are stated in the opinion.

Mr. R. H. Gilmore and *Mr. Henry A. Prince* for appellant:

The trial court, by overruling the demurrer, adjudged that the bill was sufficient, and this became the final law of the case upon this point, because it was not appealed

from and was not overruled by the trial court. Sufficiency of the bill cannot now be tested in this court. *Great Northern Ry.* v. *McLaughlin*, 17 C. C. A. 330, 333; *Foltz* v. *St. Louis &c.*, 8 C. C. A. 635, 641; *Huntington* v. *Laidley*, 79 Fed. Rep. 865; *Mercantile &c.* v. *Missouri &c.*, 84 Fed. Rep. 383; *Bryant &c.* v. *Robinson*, 79 C. C. A. 259, 267; *Kilbourne* v. *Sunderland*, 130 U. S. 505, 514; *Tyler* v. *Savage*, 143 U. S. 97.

Unless a full, complete and adequate remedy at law exists in a Federal court, the appellant has, by reason of diverse citizenship, the right to resort to a Federal court of equity; and this notwithstanding that the state statute may give an adequate remedy at law in a state tribunal. *Atchison, T. & S. F. Ry. Co.* v. *Sullivan*, 97 C. C. A. 1; *Brun* v. *Mann*, 85 C. C. A. 513; *Colar* v. *Stanley Co.*, 89 Fed Rep. 257, 259; *Smythe* v. *Ames*, 169 U. S. 466, 517; *Jones* v. *Mutual F. Co.*, 123 Fed Rep. 518; *United States &c.* v. *Cable*, 39 C. C. A. 264; *Yonley* v. *Lavender*, 21 Wall. 276; *Sheffield Co.* v. *Withrow*, 149 U. S. 574, 579.

The right to trial by jury, preserved by § 723 of the Federal statute, is not jurisdictional, but is a personal privilege and may be waived. *Waite* v. *O'Neal*, 72 Fed. Rep. 351; *Wamath* v. *O'Daniel*, 86 C. C. A. 277; *Foltz* v. *St. Louis &c.*, 8 C. C. A. 635; *Less* v. *English*, 29 C. C. A. 275; *International Co.* v. *Norwich &c.*, 17 C. C. A. 608.

Appellees' plea of the adequacy of legal remedy was waived by not being pressed before the trial court, and cannot be availed of here. *Huntington* v. *Laidley*, 79 Fed. Rep. 865; *Bryant Bros. Co.* v. *Robinson*, 79 C. C. A. 259, 267; *Adams* v. *Howard*, 20 Blatchf. 38; *Richardson* v. *Green*, 9 C. C. A. 565.

The bill should not be dismissed in this court for lack of equity, because if the trial court had not overruled the demurrer or if it had passed upon the plea a defect in the bill could have been cured by amendment. *Walla Walla* v. *Water Co.*, 172 U. S. 1.

As the trial court entered a decree on the merits in favor of appellees there must have been jurisdictional matter in the bill. It is not consistent to contend that the trial court had jurisdiction to find for the appellees but none to find for the appellant.

Though the tax in this case is absolutely void, the appellant has no adequate remedy at law within the decisions, and injunction is an available and appropriate remedy. *Gale* v. *Statler &c.*, 47 Colorado, 72, 77; *Fargo* v. *Hart*, 193 U. S. 490; *Colo. F. & L. S. Co.* v. *Beerbohm*, 43 Colorado, 464, 481; *Ex parte Young*, 209 U. S. 123; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 164; *Western Un. Tel. Co.* v. *Anderson*, 216 U. S. 165.

Mr. J. A. Marsh, with whom *Mr. W. H. Bryant* was on the brief, for appellees.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit by the Singer Company, a New Jersey corporation, to enjoin the collection of taxes levied by the city and county of Denver, in the State of Colorado. The company made a return of taxable personal property at a valuation of $3,800, to which the assessor added other personalty at a valuation of $62,500, making a total assessment of $66,300, which was afterwards embodied in a tax list delivered to the treasurer for collection. The company tendered payment of $126.50, the amount of taxes due on the property returned by it, and refused to pay the amount attributable to the additional assessment. The treasurer declined to accept the tender, and was threatening to enforce the entire tax, when the suit was brought. The bill charged that the assessor, although required by law to give the company timely notice of the additional assessment, had failed to give it any notice, and that it was thereby prevented from presenting

objections to the increase and obtaining a hearing and ruling thereon by the assessor and by the proper reviewing authority to which it was entitled by the local law. There were also allegations to the effect that the company had no property within the city and county other than that returned by it; that the additional assessment and the taxes levied thereon were illegal because of the assessor's failure to give the required notice; and that to enforce the collection of such taxes would be violative of designated provisions of the Constitution of the United States. The defendants demurred on the ground that the bill did not state a case for equitable relief, but the demurrer was overruled. The defendants then answered repeating the objection made in the demurrer and interposing other defenses which need not be noticed now. Upon the hearing a decree was entered dismissing the bill, and the company appealed to the Circuit Court of Appeals. That court held that there was an adequate remedy at law, and affirmed the decree. 179 Fed. Rep. 628. The company then took the present appeal.

In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stat., § 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658. There was no waiver here. The objection was made by the demurrer and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276.

In the last case it was said of the pertinency of the guiding rule in cases such as this (p. 281): "A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity."

A statute of Colorado enacted in 1870 (Laws 1870, p. 123, § 106) and embodied in subsequent revenue acts (2 Mills' Ann. Stat., § 3777; Laws 1902, c. 3, pp. 43, 146, § 202; Rev. Stat. 1908, § 5750) declares that "in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or others errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." This statute

imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the Supreme Court of the State, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: "Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy." *Price* v. *Kramer*, 4 Colorado, 546, 555. And again: "The statute furnishes another remedy in such cases which is complete and adequate." *Woodward* v. *Ellsworth*, *Id.* 580, 581. And that this view of the statute still prevails is shown in *Hallett* v. *Arapahoe County*, 40 Colorado, 308, 318, decided in 1907, where, in refusing equitable relief against the collection of taxes alleged to be illegal, the court said (p. 318): "By § 3777, 2 Mills' Ann. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate."

We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, for that they could not do (*Payne* v. *Hook*, 7 Wall. 425, 430; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Smythe* v. *Ames*, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNiel*, 13 Wall. 236, 243; *United States Mining Co.* v. *Lawson*,

134 Fed. Rep. 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows* v. *Chicago*, 11 Wall. 108, 112; *State Railroad Tax Cases*, 92 U. S. 575, 613–614; *Shelton* v. *Platt*, 139 U. S. 591, 597; *Allen* v. *Pullman's Palace Car Co.*, *Id.* 658, 661; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 686.

But it is said that in an action to recover back the money the tax list would be treated as the judgment of a special tribunal conclusively determining all questions in favor of the validity of the tax. It well may be that, if the list were regular on its face, it would be presumptive evidence that the tax was valid, but we find nothing in the statutes of Colorado or in the decisions of its Supreme Court which goes to the length suggested. The plain implication of the section providing for repayment is otherwise. Another section (Rev. Stat., § 5677) declares that the tax list "shall be *prima facie* evidence that the amount claimed is due and unpaid," and the only decision cited by the company speaks of the assessment as being presumptively right "in the absence of any evidence to the contrary." *Singer Manufacturing Co.* v. *Denver*, 46 Colorado, 50.

It also is said that there were special circumstances calling for equitable relief, in that the act of the assessor in making the additional assessment without giving any notice of it was necessarily a fraud, an accident, or a mistake. No such claim was made in the bill, and even had it been it would be unavailing unless founded upon something more than the charge that no notice was given and that

the company had no property within the city and county other than that returned by it. We say this because the fraud, accident or mistake which will justify equitable relief must be something more than what is fairly covered by the charge here made, for otherwise the well settled rule that mere illegality in a tax affords no ground for such relief would be a myth. There really would be no case in which the illegality could not be said with equal propriety to be the result of fraud, accident or mistake, for it always arises out of some deviation from law or duty.

Concluding, as we do, that the company had a plain, adequate and complete remedy at law, the decree dismissing the bill is

Affirmed.